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**The Evolution of the Trust:  
A Creative Solution to Trustee Liability under CERCLA**

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## INTRODUCTION

The primary focus of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)<sup>1</sup> is environmental cleanup. Generally, CERCLA (Superfund) imposes retroactive, strict, and joint and several liability on owners, operators, generators, and transporters.<sup>2</sup> Recovery costs have

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<sup>1</sup>Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-9675 (1988)).

<sup>2</sup>CERCLA § 107(a). It states:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section--

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated at any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, or a hazardous substance, shall be liable for--

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury,

been obtained from bankrupt estates, corporate officers, active stockholders, current landowners, prior landowners, foreclosing lenders, successor corporations, lessors and lessees, federal government agencies, and persons with an unused "capacity to control" hazardous waste.<sup>3</sup>

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destruction, or loss resulting from such a release; and  
 (D) the costs of any health assessment or health effects study carried out under section [1]04(i) of this title . . . .

<sup>3</sup>See Douglas M. Garrou, Comment, *The Potentially Responsible Trustee: Probable Target for CERCLA Liability*, 77 VA. L. REV. 113, 115-16, nn. 9-19 (1991); see, e.g., *In re Peerless Plating Co.*, 70 Bankr. 943, 948 (Bankr. W.D. Mich. 1987) (holding bankruptcy estates have been subject to CERCLA); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986) (holding an officer who supervised or arranged for the disposal of hazardous waste liable, not requiring piercing the corporate veil to reach the corporate officer); *Vermont v. Staco, Inc.*, 684 F. Supp. 822 (D. Vt. 1988) (shareholders who managed a facility held personally liable as owners or operators under CERCLA); *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985) (imposing strict liability on a current owner of a facility from which there is a release or threatened release, without regard to causation); *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568 (5th Cir. 1988) (lending institution that supplied funding for development of already contaminated land held liable as a prior owner); *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986) (holding a foreclosing lender liable under CERCLA that took title to a hazardous waste site); *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86 (3d Cir. 1988), cert. denied, 488 U.S. 1029 (1989) (stating under CERCLA § 101(21) the definition of "person" should include corporate successors where the successor corporation has merged with or consolidated with the corporation that is the responsible party); *United States v. South Carolina Recycling & Disposal*, 653 F. Supp. 984 (D.S.C. 1986) *aff'd in part, vacated in part sub nom. United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), cert. denied, 109 S. Ct. 3156 (1989) (lessee held liable apart and distinct from its role as operator of a site, because lessee maintained control over and responsibility

The potential liability of trustees as a responsible party for cleanup costs under CERCLA is a topic of discussion in recent scholarship.<sup>4</sup> Essentially, the issues are how to implement a

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for the use of the property because he stood in the shoes of the property owners); *Farmers Home Administration to Pay To Clean Up Facility It Foreclosed On*, 4 *Toxics L. Rep.* (BNA) 269 (Aug. 9, 1989) (the FHA recently agreed to pay cleanup costs on a Georgia site foreclosed upon by the agency); and *United States v. Northernair Plating Co.*, 670 F. Supp. 742 (W.D. Mich. 1987) (corporate officer responsible for arranging disposal of wastes held liable, even though lack of evidence of actual involvement).

<sup>4</sup>See, e.g., Margaret V. Hathaway, *Recent Rulings on Environmental Liability: Big Wins For Lenders, Big Losses for Trustees*, 7 *Toxics L. Rep.* (BNA) 1097 (Feb. 17, 1993) (discussing the ruling in *Phoenix v. Garbage Services Co.* 1993 U.S. Dist LEXIS 1404 (D. Ariz. Jan. 22, 1993)) [hereinafter *Phoenix II*] see discussion *infra* Section IV.A.5.b; Keith M. Casto and Cheryl L. Mattson, *Environmental Liabilities for Fiduciaries*, 7 *Toxics L. Rep.* (BNA) 26 (Jun. 3, 1992) (trustees should approach their fiduciary duties by conducting a preacquisition environmental investigation of their property and by contractually shifting the risk of environmental contamination to other parties); H. Lewis McReynolds, Comment, *The Unsuspecting Fiduciary and Beneficiary as "Owner or Operator" of a Hazardous Waste Facility Under CERCLA*, 44 *BAYLOR L. REV.* 71 (1992) (the extent of potential liability for fiduciaries and beneficiaries seems endless and without change; both fiduciaries and beneficiaries may continue to find themselves subject to seemingly unending risk as an owner or operator of contaminated property); Garrou, *supra* note 3, at 148 (concluding CERCLA liability is a "nightmare" from which the potentially responsible trustee might never awaken); Deborah A. Lawrence, *Liability of Trustees under CERCLA*, 34 *RES GESTAE* 561 (1991) (with liability for environmental cleanup being imposed on any solvent entity with a connection to the property or the facility in question, there is no reason to believe that trustees will be immune from this trend); William L. Hoey, Note, *Personal Liability of Trustees Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)*, 68 *U. DET. L. REV.* 73, 96-97 (1990) (stating a prudent trustee may have earned nothing more than a passage to financial ruin [under Superfund] and "[t]he trust is a creature of legal creativity and will react--by self extinction if need be"); Kathryn E. Barnhill, *Trustees' Reasonable Expectations of*

cleanup, allocate costs and liability among the responsible parties under Superfund, and ensure productive use of the land whenever possible; almost all agree continued productive use of land is a paramount concern. The paradox is that unless remediated land can be reused, new industry, by default, will locate on pristine land, making the latter more scarce with time.

There is no legal certainty of the extent of trustee liability, but resolution of this issue is important to the reuse of Superfund sites. For that reason, the focus of this analysis is finding that solution. It reviews CERCLA liability; lender liability under CERCLA; the framework of fiduciary ownership and management; judicial interpretations of trustee liability;<sup>5</sup>

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*Coverage for Environmental Liability: Old Insurance for a New Problem*, 39 *DRAKE L. REV.* 843, 862 (1990) (arguing courts should follow the continuous exposure definition of "occurrence" when dealing with personal injury and property damage claims resulting from environmental contamination, permitting fiduciaries, beneficiaries, and heirs to receive the freedom from liability for which the insured bargained under standard general liability policies).

<sup>5</sup>This is a lengthy discussion, but with good reason. While the words of judges and pleaders were being taken down in year books as early as the 1280s in England, by the fourteenth century they were being cited as evidence of law and practice. Strictly, a "precedent" was a judgment entered on the roll. Because it gave no reasons in the record, the development of legal principles was largely an oral tradition. Case law could not be based on judicial decisions. The law which emerged was "common erudition." Fitzherbert, in his *NEW NATURA BREVIVM* (1534), was the first to discuss earlier cases critically. It was not until the early nineteenth century that the principle of *stare decisis* was given widespread acceptance. It has been said that from the earliest period, there have been on the bench both "timid souls" and "bold spirits", and to seek uniformity of practice at different periods is to seek what never existed. J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 171-74 (1979) (citations omitted). In this analysis, it is



federal legislative responses; and state legislation. It continues with the case study of the Industri-Plex Site in Woburn, Massachusetts, that successfully used a trust as a creative instrument to provide a solution to managing an existing Superfund site.<sup>6</sup> From the case study and previous material, the last section closes by synthesizing the problems of trustee liability. It concludes the trust is a legal instrument that, from its inception to current use in the environmental law field, is a viable tool to bring once contaminated land back into productive use.

## I. CERCLA Liability

### A. Background

Under Superfund, the President authorizes clean up of "facilities"<sup>7</sup> where "hazardous substances"<sup>8</sup> have been

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important for the reader to understand the facts of the case as well as the law to determine whether the case either controls or is distinguishable from the particular situation faced in prior precedent.

<sup>6</sup>United States v. Stauffer Chemical Company, Nos. ENF 01-87-E005, 01-88-COV3, 1989 EPA Consent LEXIS 137, (D. Mass. Oct. 28, 1989). Stauffer is the only CERCLA consent decree with the EPA in the United States that used a custodial trust. Search of LEXIS, ENVIRN library, ALLEPA file, CUSTODIAL TRUST request (Mar. 4, 1993).

<sup>7</sup>The statute defines "facility" to include, *inter alia*, "any site or area where hazardous substance has . . . come to be located." CERCLA § 101(a).

"released."<sup>9</sup> In 1980, Congress created a revolving fund for the United States EPA to use to enforce and clean up contaminated sites and later obtain reimbursement from the responsible parties.<sup>10</sup> In addition, it allows the EPA to impose civil liabilities and recover "response costs"<sup>11</sup> incurred in the cleanup and to recover "natural resource damages."<sup>12</sup> These may be recovered from entities associated with sites determined to be "potentially responsible parties" or PRPs.<sup>13</sup> The Superfund Amendments and Reauthorization Act of 1986 (SARA) provided additional money to finance operation of the fund.<sup>14</sup>

#### B. Liability

The EPA, state, or private party that has conducted a

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<sup>8</sup>"Hazardous substance" includes over 700 substances. See 40 C.F.R. § 302.4 (1991).

<sup>9</sup>Under CERCLA § 101(22), "release" is defined broadly to include such things as spills, emissions, discharges, leaks, and even burial of drums and storage containers, even if the materials inside do not leak from the containers.

<sup>10</sup>42 U.S.C. § 9611 (1980).

<sup>11</sup>CERCLA § 107(a)(4).

<sup>12</sup>*Id.* at § 107(f)(1).

<sup>13</sup>*Id.* at § 107.

<sup>14</sup>Superfund provided CERCLA with an \$8.5 billion budget for the 1980-91 period. Pub. L. No. 99-499, 100 Stat. 1613 (codified at 42 U.S.C. §§ 9601-9675 and scattered sections of U.S.C.). The Superfund was extended for an additional period to begin October 1, 1991, and end September 30, 1994. Pub. L. No. 101-508, 104 Stat. 1388.

cleanup of a National Priorities List (NPL) site may sue and recover their costs.<sup>15</sup> First, they may recover from prior owners or operators of a facility from which there is a release or threatened release of a hazardous substance.<sup>16</sup> Second, they may recover from transporters who brought hazardous substances to a facility selected by the transporter.<sup>17</sup> Third, they may recover from persons who arranged for disposal or treatment of the hazardous material at the facility.<sup>18</sup>

### C. Standard of Liability

Liability is imposed on responsible parties without regard to fault or negligence.<sup>19</sup> Joint and several liability is imposed for "indivisible injury."<sup>20</sup> A Potentially Responsible Party (PRP) can be held liable for the entire cleanup by EPA, the state or a private party, and may then collect a "fair share" from other contributing PRPs.<sup>21</sup> This applies retroactively to include cleanup costs resulting from actions which occurred prior to

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<sup>15</sup>*Id.* at § 101(20)(A).

<sup>16</sup>*Id.* at § 101(35)(C).

<sup>17</sup>*Id.* at § 107(a)(4).

<sup>18</sup>*Id.* at § 107(a)(3).

<sup>19</sup>*See, e.g., Monsanto, supra note 3, at 167-68; Northeastern Pharmaceutical, supra note 3, at 726.*

<sup>20</sup>*See, e.g., Monsanto, supra note 3, at 171-73; Shore Realty Corp., supra note 3, at 1032.*

<sup>21</sup>*Id.*

passage of the statute.<sup>22</sup> An owner or operator may be liable for conduct that was legal at the time, unless it was a "federally permitted release."<sup>23</sup> The result is that a PRP may be liable for the entire amount of the hazardous substance cleanup, regardless of the contribution a PRP actually released.<sup>24</sup> This enables the EPA, state, or private party to choose which PRP or PRPs to sue. The law does not require the EPA to join all other potential defendants, but PRPs may join other responsible parties.

#### D. The "Innocent Landowner" Defense

Superfund contains three narrow defenses when releases are caused solely by an act of (1) God, (2) war, or (3) third parties.<sup>25</sup> The third party defense was expanded by the 1986 SARA Amendments to include an "innocent landowner defense."<sup>26</sup> In determining whether a landowner had "no reason to know," a court will consider the landowner's specialized knowledge or

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<sup>22</sup>See, e.g., *Monsanto*, *supra* note 3, at 167-68; *Northeastern Pharmaceutical*, *supra* note 3, at 733-34.

<sup>23</sup>*Id.* at § 101(10). Those releases are in compliance with specified federal and state environmental laws pursuant to a valid federal permit. *Id.*

<sup>24</sup>See *Amland Properties Corp. v. Aluminum Company of America*, 711 F. Supp. 784 (D. N.J. 1989). The owner was not entitled to recover most of the \$25 million it spent cleaning up hazardous waste contamination at the facility because its response action was not entirely consistent with the NCP. See also CERCLA § 105.

<sup>25</sup>CERCLA § 107(b)(3).

<sup>26</sup>*Supra* note 14.

experience.<sup>27</sup>

In *United States v. Pacific Hide & Fur Depot, Inc.*,<sup>28</sup> the court determined there was not an absolute duty to inquire into the existence of hazardous waste when acquiring an interest in property. It rejected the argument of the government that CERCLA required everyone to make such a preliminary inquiry.<sup>29</sup>

#### E. Duty to Disclose

CERCLA<sup>30</sup> provides that past owners who knew of a release or a threatened release during ownership, and subsequently transferred ownership to another person without disclosing that fact, will be held liable.<sup>31</sup> They may not assert the "innocent landowner" defense.<sup>32</sup> In operation, this means that liability attaches to owners who did not actually participate in the

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<sup>27</sup>CERCLA at § 101(35)(B); H.R. REP. NO. 962, 99th Cong. 2d Sess. at 187-88, reprinted in 1986 U.S.C.C.A.N. 3280, 3281.

<sup>28</sup>716 F. Supp. 1341 (D. Idaho 1989).

<sup>29</sup>*Id.* at 1348. In that case, the court determined the transfer from a father to his three children in an *inter vivos* trust was more like an inheritance than a private transaction, which permitted the defendants to successfully assert the innocent landowner defense. *Id.*

<sup>30</sup>CERCLA § 101(35)(C). This provision was added by SARA § 101(f).

<sup>31</sup>*Id.* at § 107(a)(1). *Northeastern Pharmaceutical*, *supra* note 3.

<sup>32</sup>*Id.* at § 101(35)(C).

disposal of hazardous wastes.<sup>33</sup>

## II. Lender Liability Under CERCLA

### A. "Owner" or "Operator" Under Section 107

Superfund considers "the owner and operator of . . . a facility" among the parties liable for the government's cleanup costs.<sup>34</sup> CERCLA excluded those holding only a "security interest" in the property from the definition of "owner or operator."<sup>35</sup>

### B. Judicial Interpretation of Lender Liability

Since CERCLA does not define the actions a security holder can undertake without being liable for participating in the management of a "facility," the courts have been left to address

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<sup>33</sup>*Supra* note 30.

<sup>34</sup>*Id.*

<sup>35</sup>*Id.* at § 101(20)(4). This occurs when a person does not participate in the management of the facility. The role is "passive" in protecting the security interest, compared with the "active" role of management. The legislative history of CERCLA states that an "owner" "does not include certain persons possessing indicia of ownership (such as a financial institution) who, without participating in the management or operation of a vessel or facility, hold title in order to secure a loan or in connection with a lease financing arrangement under the appropriate banking laws, rules, or regulations." H.R. REP. No. 172, 96th Cong., 2d Sess. 36, reprinted in 1980 U.S.C.C.A.N. 6160, 6181.

the problem. The courts have examined three areas: foreclosure liability, operational control liability, and lender liability.

### 1. Foreclosure Liability

Foreclosing banks are subject to CERCLA liability. Even if they are not contributors to the original contamination, they can be held liable as "owners" under CERCLA.

In *United States v. Maryland Bank & Trust Company*,<sup>36</sup> the court held that a bank purchasing property at a foreclosure sale could be found liable under CERCLA as the "owner" of a hazardous waste facility, even though it did not contribute to the contamination. It determined the bank held title not to protect its security interest, but to protect its investment.<sup>37</sup>

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<sup>36</sup>*Supra* note 3, at 573 [hereinafter MB&T].

<sup>37</sup>*Id.* at 579. The court drew the distinction between security interest and investment based on an analysis of the facts of the case. MB&T loaned money to the McLeods for two waste disposal businesses. The McLeods dumped hazardous wastes on the property. MB&T knew garbage was dumped, but did not know it was hazardous waste. The McLeods' son obtained a loan from MB&T to buy the farm from his parents. He defaulted and MB&T foreclosed and purchased the property at the foreclosure sale. The court determined that although the legislative history indicated the owner/operator exception was intended to protect only those persons holding security interests at the time of cleanup, which was MB&T's position when it purchased the property. After its security interest ripened into full title, MB&T was not exempt from liability, because it would receive a windfall if the property were cleaned up at taxpayer expense after four years of ownership. *Id.* at 575-80.

In *Guidice v. BFG Electroplating and Manufacturing Company*,<sup>38</sup> the court refused to grant summary judgment in favor of a bank that foreclosed on property and took a sheriff's deed to property that later was found to be contaminated. The court held a bank that forecloses on property containing hazardous waste is no longer within the exemption for security interest and can be held liable for cleanup costs under CERCLA.<sup>39</sup> The reason for this conclusion was that banks were not excluded from liability in the 1986 amendments, as were state and local governments, and a lender who purchased at foreclosure sale should be liable to the same extent as any other bidder.<sup>40</sup>

## 2. Operational Control Liability

The CERCLA "security interest exemption" from liability as an owner or operator protects lenders who do not "participate in the management" of a site.<sup>41</sup> In *United States v. Mirabile*,<sup>42</sup> a secured lender who became intensively involved in the management of the facility was treated as an owner or operator.

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<sup>38</sup>30 Env't. Rep. Cas. (BNA) 1665 (W.D. Pa. Sept. 1, 1989). The bank did not hold title when the CERCLA action was initiated. It transferred it without a profit after eight months. *Id.* at 1666-67.

<sup>39</sup>*Id.* at 1671.

<sup>40</sup>*Id.* at 1670-71.

<sup>41</sup>CERCLA § 101(20)(A).

<sup>42</sup>15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,994 (E.D. Pa. 1985).



The court distinguished between financial management and management of "operational, production or waste disposal activities."<sup>43</sup> Participation in the financial aspects of operation is not sufficient to warrant CERCLA liability, but participation in the actual operation was sufficient to create CERCLA liability.<sup>44</sup>

### 3. Lender Liability after *Fleet Factors*

There are two predominant views of lender liability. The first view is that a lender incurs liability from "actual" involvement in the management of a facility. On the other hand, a "capacity to control" test has also imposed liability.

The potential scope of lender liability was expanded in *United States v. Fleet Factors Corp.*,<sup>45</sup> which held that a lender

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<sup>43</sup>*Id.* at 20,995-96.

<sup>44</sup>*Id.* at 20,997. Mirabile, as the present owner, sued American Bank & Trust Company (ABT) and Mellon Bank National Association (Mellon). Mellon counterclaimed against the Small Business Administration (SBA). Only Mellon, however, was found to have gone beyond the financial decisions into the realm of day-to-day management of the business. The officer from Mellon was frequently at the plant, determined the priority in which orders were to be filled, demanded that additional sales effort be made, and directed manufacturing changes and reassignment of personnel. For these reasons, the motion to dismiss was denied. *Id.* at 20,995-97.

<sup>45</sup>901 F.2d 1550 (11th Cir. 1990) cert. denied, 111 S.Ct. 752 (1991). *Fleet Factors Corp. (FLEET)* entered into a factoring agreement with a fabric printing company (SPW) that had filed for bankruptcy under Chapter 11. Fleet agreed to advance funds in exchange for the accounts receivable of SPW; obtained a security interest in all

may incur Superfund liability by engaging in the financial management of a contaminated facility. The court found that a secured creditor may incur liability "by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes."<sup>46</sup> It went beyond *Mirabile*<sup>47</sup> and *Maryland Bank and Trust*<sup>48</sup> in stating involvement in day-to-day operations of the facility, or in management decisions relating to hazardous wastes, was not necessary to incur liability.<sup>49</sup>

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equipment, inventory, and fixtures as well as a secured interest in the facility of SPW; and refused to advance further funds. SPW filed for Chapter 7 bankruptcy. Later, Fleet foreclosed on some equipment and inventory, but not the facility. The EPA inspected the plant and found asbestos throughout the plant. The government sought to recover cleanup costs. It claimed Fleet participated in the management of the facility prior to the auction, to the extent it was a site "operator" under CERCLA. Fleet argued the court should distinguish "permissible participation" in the financial management of the facility from "impermissible participation" in the day-to-day or operational management of a facility. *Id.* at 1552-56. See *United States v. Fleet Factors Corp.*, No. 687-070, (S.D. Ga. Feb. 19, 1993). The court held in the liability trial Fleet Factors was liable under Superfund for cleanup costs. The court was not prepared to rule on whether Fleet Factors was liable as an owner/operator under Section 107(a)(1) of CERCLA, or as an "arranger for disposal" under Section 107(a)(3). *Id.* See also *Court Holds Fleet Factors Liable, Defers Ruling on Basis for Liability*, 23 Env't Rep. (BNA) 2834 (Feb. 26, 1993).

<sup>46</sup>*Id.* at 1557.

<sup>47</sup>*Supra* note 42, at 20,994.

<sup>48</sup>*Supra* note 3, at 537.

<sup>49</sup>*Id.* at 1557. The standard was whether the management of the facility was "sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose." The Eleventh Circuit determined

In contrast, *In re Bergsoe Metal Corp.*<sup>50</sup> held the mere capacity or unexercised right to control the operations of a facility by a municipality was insufficient to void a secured creditor's exemption from liability. The court in *Bergsoe Metal* determined the critical point, unlike *Fleet Factors*,<sup>51</sup> was what the municipality did, not what it could have done.<sup>52</sup>

### C. EPA Lender Liability Rule

The EPA's rule on lender liability<sup>53</sup> was promulgated on April 29, 1992 in response to the adverse reaction of the financial community to the decision of the Eleventh Circuit in

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this would encourage lenders to investigate and monitor hazardous waste treatment systems and policies of their borrowers, giving lenders involved a "strong incentive" to participate in the resolution of hazardous waste problems of their borrowers. The only intervention allowed without incurring liability was that of "occasional and discrete financial decisions." *Id.* at 1557-58.

<sup>50</sup>910 F.2d 668 (9th Cir. 1990). A municipal corporation acquired title to contaminated property as security in a sale-and-lease-back arrangement to finance construction and operation of a lead recycling plant. The municipality acted as creditor. Its involvement was limited to negotiating and encouraging the building of the plant, permitting it to inspect and foreclose upon the premises as stated in the lease, and entering into a work agreement with the debtor and trustee not to exercise its default remedies under the lease so the workout could proceed. *Id.* at 672-73. See also *United States v. Nicolet*, 29 Env't Rep. Cas. (BNA) 1851 (E.D. Pa. 1989).

<sup>51</sup>*Supra* note 45, at 1550.

<sup>52</sup>*Bergsoe Metal*, *supra* note 50, at 672.

<sup>53</sup>57 Fed. Reg. 18,343 (1992) (to be codified at 40 C.F.R. §§ 300.1100).

*Fleet Factors*.<sup>54</sup> It attempted to resolve the uncertainty concerning the extent of involvement permitted to a secured creditor.<sup>55</sup>

The rule provides a two-prong test of participation in management so as to be liable under CERCLA.<sup>56</sup> The first prong penalizes taking control of the borrower's environmental compliance decision-making.<sup>57</sup> The second portion of the test penalizes taking responsibility for "overall management" of the borrower's affairs with respect to either environmental compliance or substantially all of the operational aspects of the

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<sup>54</sup>*Supra* note 45, at 1550.

<sup>55</sup>*Id.*

<sup>56</sup><sup>57</sup> Fed. Reg. 18,343, 1383. See Hathaway, *supra* note 4, at 1100. In addition to a review of *Phoenix II*, *supra* note 4, at 1404, the author reviewed three other cases under CERCLA which were decided after the EPA lender liability rule: *Michigan v. Tiscornia*, No. 5:90-CV-62, at 14 (W.D. Mich. Jan. 12, 1993) (holding that conditioning continued financing on replacing the chief executive officer with a turnaround specialist acceptable to the bank indicated the bank influenced, but did not control, the borrower's decision making); *Ashland Oil, Inc. v. Sonford Products Corp.* No. 3-91-0715, at 5 (D. Minn. Dec. 24, 1992) (holding the lender of money to a tenant, who foreclosed and held the property for less than one month, had not participated in the management of the property securing the loan sufficiently to lose the secured creditor exemption); *Grantors to the Silresim Site Trust v. State Street Bank & Trust Co.*, No. 88-1324-K, transcript of court proceedings at 89 (D. Mass. Nov. 24, 1992) (holding the bank, in loaning money to the owners of a hazardous waste facility and insisting the original CEO no longer remain in charge, was entitled to the secured creditor exemption, but declining to decide whether the lender liability rule applied). See also Patricia L. Quentel, *EPA Issues Long-Awaited Lender Liability Rule*, 22 ELR 10637 (October 1992).

<sup>57</sup>*Id.*

borrower.<sup>58</sup> This test does not penalize the "capability" to manage on the part of the lending institution which is unexercised. However, the test supports and permits active involvement in the borrower's financial and administrative affairs.<sup>59</sup> The rule does not address whether institutional trustees or fiduciaries fall within the security interest exemption under CERCLA.<sup>60</sup>

### III. FRAMEWORK OF FIDUCIARY OWNERSHIP AND MANAGEMENT

#### A. Evolution of the Trust

##### 1. Importance to Modern Environmental Law

If one views history as a continuum of experience, the significance of the past is that it is a source for learning old ideas anew. Through the study of history one sees the problems of the present in sharper focus and, more importantly, sees the solutions to those problems within the context of the evolutionary process. In the field of environmental law, such an examination is crucial. The trust is one equitable tool that has

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<sup>58</sup>*Id.*

<sup>59</sup>*Id.*

<sup>60</sup>*Id.* 57 Fed. Reg. at 18349 (suggesting that a trustee would not be personally liable, and that in most instances the trust's assets are available for cleanup of a trust property).

adapted to the needs of the past, and a review of its origins demonstrates its adaptability to the changing needs of this modern society.<sup>61</sup>

## 2. The Origin of Uses and Trusts

Conveyancers of land in medieval England invented the "use," which became the ancestor of the modern trust.<sup>62</sup> Simply, the owner of land enfeoffed<sup>63</sup> another person to "use" the land.<sup>64</sup> In

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<sup>61</sup>Pierre Lepaulle, *Civil Law Substitutes for Trusts*, 36 YALE L.J. 1126 (1927). There is no trust in the civil law. Lepaulle wrote:

[Trusts] are like those extraordinary drugs curing at the same time toothache, sprained ankles, and baldness, sold by peddlers on the Paris boulevards; they solve equally well family troubles, business difficulties, religious and charitable problems. What amazes the skeptical civilian is that they really do solve them . . . .

*Id.*

<sup>62</sup>GEORGE BOGERT, *THE LAW OF TRUSTS AND TRUSTEES*, § 2, at 13 (2d ed. 1982). See also OLIVER WENDELL HOLMES JR., *THE COMMON LAW* 409 (Boston, Little, Brown and Company 1881).

<sup>63</sup>To "enfeoff" is to invest with an estate by feoffment, and to make a gift of any corporeal hereditaments to another. BLACK'S LAW DICTIONARY 474 (5th ed. 1979).

<sup>64</sup>*Id.* at 14. The Roman *fidei-commisum* fulfilled a similar function. It became customary to devise property to one capable of taking it, with a request that he devise property to one capable of taking it. *Id.* at 15. Origin of the trust or "use" in English common law, however, is of different ancestry. See 2 JOHN AUSTIN, *LECTURES ON JURISPRUDENCE OF THE PHILOSOPHY OF POSITIVE LAW* 90 (Robert Campbell ed., New York, James Cockcroft and Company 1875).

particular, the English use has been said to be modeled after the *treuhand* or *salman* developed under Germanic Law.<sup>65</sup> In addition, the Frankish influenced the use of a third party to act for the beneficiary.<sup>66</sup> Shortly after the Norman Conquest in 1066, the thread of cases began which saw a man conveying his land to another "to the use" of a third.<sup>67</sup> This flourished in the thirteenth century with the arrival of the friars of St. Francis, whose ownership of land was forbidden by the vow of poverty.<sup>68</sup> By the early 1400s, during the time of Henry V, the "use" was common in England for landholding.<sup>69</sup>

### 3. Uses and Trusts Before the Statute of Uses

Because of the strict rules of pleading in English law, the

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<sup>65</sup>*Id.* at 15. The *salman* was a person to whom land was transferred in order that he might make a conveyance according to his grantor's direction. *Id.*

<sup>66</sup>2 FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF THE ENGLISH LAW BEFORE THE TIME OF EDWARD I 230 (2nd ed. 1968) (1898). The *Lex Salica* employed it with the intermediation of a third person, who had seisin of his lands and goods, to succeed in appointing or adopting an heir. (*Lex Salica*, tit. 46 De adfathamire. Heusler, *Institutionem*, i. 245). *Id.*

<sup>67</sup>*Id.*

<sup>68</sup>*Id.* at 231.

<sup>69</sup>BOGERT, *supra* note 62, § 2, at 14. Henry V reigned from 1413-1422.

interests of the *cestui que use*<sup>70</sup> were not be protected by the courts of common law since no writ existed to fit the case.<sup>71</sup> Development of the Court of Chancery brought a change as the custom evolved to petition the King or his Council in cases where there was no remedy at law.<sup>72</sup> Early in the fifteenth century the petitions to enforce uses and trusts were recognized by the Chancellor in Equity.<sup>73</sup>

#### 4. The Statute of Uses

By the beginning of the sixteenth century in England uses and trusts had incurred the displeasure of the crown.<sup>74</sup> Specifically, they relieved tenants of their burdens of feudal landholding, enabled religious orders to have the benefit of

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<sup>70</sup>The person for whose use and benefits the lands or tenements are held by another. BLACK'S LAW DICTIONARY 208 (5th ed. 1979). The *cestui que use* has the right to receive the profits and benefits of the estate, but the legal title and possession reside in the other. *Id.*

<sup>71</sup>*Id.* at 21-22. Ecclesiastical courts had no jurisdiction to enforce them. As a result, trusts existed only as honorary obligations and had no standing in any court. *Id.*

<sup>72</sup>*Id.* at 22. This became common during the reign of Edward I from 1272-1307. Here the Chancellor, as conscience of the King, decided cases on the basis of equity and fairness, rather than on technical compliance with writs and pleadings. *Id.*

<sup>73</sup>*Id.* See GEOFFREY R.Y. RADCLIFFE & GEOFFREY N. CROSS, THE ENGLISH LEGAL SYSTEM 134 (3d ed. London, Butterworth & Co., Ltd. 1954).

<sup>74</sup>*Id.* at 23.



land, and afforded greater freedom in the conveyancing of real property.<sup>75</sup> In response to these problems, Henry VIII in 1535 received parliamentary passage of the Statute of Uses.<sup>76</sup> It was thought that uses would cease to exist and all estates in land would be subject to the same burdens and rules of tenure and conveyance.<sup>77</sup> In fact, trusts flourished.<sup>78</sup>

### 5. Construction of Statute of Uses

The common law judges construed the Statute of Uses and determined when it executed the use and gave to the *cestui que use* the legal estate.<sup>79</sup> Still, a large number of uses were left

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<sup>75</sup>*Id.*

<sup>76</sup>27 Henry VIII, c. 10. In a case where A was seised of the property to the use, confidence or trust of B, then B was thereafter deemed to be seised of the property. This transfer took place upon creation of the use. The statute provided that where A was seized of property to the use of B, the statute affected a second, fictional livery of seisin from A to B. The *cestui que use* was to be statutory owner of the legal estate; and the feoffes (A) a channel through which the seisin passed in an instant of time to B. A similar fiction of passing of seisin occurred if A covenanted to stand seized to the use of B, or bargained and sold the land to B. The purpose and effect of executing the use was that the beneficial owner of land would die seised, so that the last will was ineffective, and the feudal incidents attached on descent to his heir. BAKER, *supra* note 5, at 217.

<sup>77</sup>BOGERT, *supra* note 62, § 4, at 25.

<sup>78</sup>See RESTATEMENT (SECOND) OF TRUSTS §§ 67-73 (1959). The Statute of Uses was repealed in England by the Law of Property Act, 1925, 12 & 13 Geo. 5, ch. 16, § 1(7).

<sup>79</sup>BOGERT, *supra* note 62, § 4, at 25.

unaffected and were recognized and enforced only in Chancery.<sup>80</sup> After the Statute of Uses, the name "trust" was applied to all such equitable interests.<sup>81</sup> This became the basis of modern trust law.<sup>82</sup>

### B. Modern Background of Trustee Liability

A modern trust is a fiduciary relationship in which one person holds a property interest, subject to an equitable obligation to use that interest for the benefit of another.<sup>83</sup> There are six basic elements of the trust.<sup>84</sup> First, the trust property or *res* is the interest in property, real or personal, tangible or intangible. Second, the settlor of the trust is the person who intentionally creates it. Third, the trustee is the individual or entity (often an artificial person such as a corporation) that holds the trust property for another's benefit. Fourth, the legal title to the trust property usually remains in the trustee. Fifth, the beneficiary, or *cestui que trust*, is the person for whose benefit the trust property is held by the trustee. Finally, the trust instrument is the document in which

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<sup>80</sup>*Id.* at 27.

<sup>81</sup>*Id.*

<sup>82</sup>*Id.* See THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 598 (5th ed., Boston, Little, Brown and Co. 1956).

<sup>83</sup>BOGERT, *supra* note 62, § 1, at 1.

<sup>84</sup>See also RESTATEMENT (SECOND) OF TRUSTS § 2, cmt. c, d, e, f, i and j.

the settlor expresses an intent to have a trust and sets forth the trust terms, including details as to beneficiaries and their right and the duties and powers of trustees. The trustee owes the beneficiary of the trust a duty to act solely in the interest of the beneficiary, without consideration of personal advantage.<sup>85</sup> Because of the nature of the relationship with the beneficiary, a trustee is expected to show more than ordinary candor, consideration, and probity in his dealing with the beneficiary.<sup>86</sup>

#### C. The Trustee as "Owner"

A trustee holds legal title to property and is generally treated as the owner with the rights, duties, and liabilities of an owner, except to the beneficiaries of the trust.<sup>87</sup> Liability follows from possession of the corpus by the trustee, who is obligated to manage the corpus for the benefit of the beneficiary under any special terms or conditions of the trust.<sup>88</sup>

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<sup>85</sup>*Id.* at 3.

<sup>86</sup>*Id.*

<sup>87</sup>WILLIAM F. FRATCHER, 3A SCOTT ON TRUSTS §265.4.

<sup>88</sup>RESTATEMENT (SECOND) OF TRUSTS § 265 states:

Where a liability to third persons is imposed upon a person, not as a result of a contract made by him or a tort committed by him but because he is the holder of the title to property, a trustee as holder of the title to the trust property is subject

Trustee liability is not limited to the value of the trust estate when the trustee is personally liable on a contract or incurs tort liability from circumstances involving the trust.<sup>89</sup> The common law interpretation of trustee liability could be superseded by a statute such as CERCLA.<sup>90</sup>

#### D. The Beneficiary as "Owner"

The "owner" of the equitable interest in trust property is the beneficiary of a trust.<sup>91</sup> The ownership of "title" to the trust assets remains in the trustee.<sup>92</sup> For that reason the beneficiary is not liable to third persons because he or she is without legal title to the trust property.<sup>93</sup> Burdens imposed by law upon the trustee are not imposed on the beneficiary.<sup>94</sup>

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to personal liability, but only to the extent to which the trust estate is sufficient to indemnify him.

<sup>89</sup>3A SCOTT, *supra* note 87, at §265.4.

<sup>90</sup>United States v. A & P Trucking Co. 358 U.S. 121, 124 (1958).

<sup>91</sup>RESTATEMENT (SECOND) OF TRUSTS § 277.

<sup>92</sup>*Id.* § 277 cmt. a.

<sup>93</sup>*Id.*

<sup>94</sup>*Id.*

### E. The Trustee as "Operator"

The definition of "person" under CERCLA includes individuals, corporations, and commercial entities.<sup>95</sup> It does not specifically include or eliminate trustees.<sup>96</sup> A trustee fulfilling duties under that trust could be liable as an operator of a facility located on trust property. For example, the *Fleet Factors*<sup>97</sup> standard, establishing liability for secured creditors "participating in the management" of a facility, is also potentially applicable in a fiduciary situation.<sup>98</sup> A trustee who does not actually "operate" the property on a day-to-day basis may merely participates in policy decisions regarding financial management, and in that capacity might be able to influence hazardous waste disposal. This could make the fiduciary strictly liable without being an operator under *Fleet Factors* logic.

## IV. JUDICIAL INTERPRETATIONS OF TRUSTEE LIABILITY

### A. Overview

Some courts have wrestled with the status of a trustee as an "owner" or "operator" under CERCLA. For purposes of discussion,

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<sup>95</sup>CERCLA § 101(21).

<sup>96</sup>RESTATEMENT (SECOND) OF TRUSTS § 175.

<sup>97</sup>*Fleet Factors*, *supra* note 45, at 1550.

<sup>98</sup>See *McReynolds*, *supra* note 3, at 85.

this analysis of the cases is divided into two parts. The first part discusses the circumstances in which the trustee was held liable: as statutory trustee under state law; as realty trustee; as trustee of a closely held corporation; as corporate liquidating trustee; and as bank trustee. The second part discusses those cases in which there was no liability: as land trustee; as beneficiaries of a contingent remainder family trust; and as a prudent trustee engaged in prompt cleanup of contaminated property after taking possession.

Because we are in the early stages of development of the law of trustee liability, it is premature to state that a body of law has developed with respect to any particular type of trust. For example, the courts are split on the issue of liability of land/realty trusts under CERCLA. The only type of trust addressed by more than one case is the corporate liquidating trust. The trend is to uniformly hold the trustee liable as successor-in-interest to the previous owner.

In some cases, the courts are willing to hold the trustee liable, irrespective of personal involvement. But in other cases, the analysis focuses on recurring themes. First, there is the distinction between "active" and "passive" roles of the trustee.<sup>99</sup> Second, there is an inquiry into the ability to influence the decisions concerning the management of the property.<sup>100</sup> Third, there is the issue of whether the trustee

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<sup>99</sup>See *infra* IV.B.1, 2; IV.C.1.

<sup>100</sup>See *infra* IV.B.3; IV.B.5.a, b; IV.C.2.a, b.

was also a participant in the management of the property in either a corporate or individual capacity.<sup>101</sup> Finally, it is significant whether the trustee tested the property for contamination during possession and proceeded with cleanup efforts after notifying the appropriate regulatory authorities.<sup>102</sup> The following decisions demonstrate the complexity of the disputes and the difficulty in determining the parties liable for cleanup costs.

## B. Trustees Liable

### 1. Statutory Trust--U.S. v. Bliss

Statutory trustees of the Houlihan Nursery Company were found jointly and severally liable under Section 107(a)(3) of CERCLA for the response costs in *United States v. Bliss*.<sup>103</sup> The

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<sup>101</sup>See *infra* IV.B.4.a, b.

<sup>102</sup>See *infra* IV.C.3.

<sup>103</sup>667 F. Supp. 1298 (E.D. Mo. 1988). The court granted the summary judgment motion of the United States against the defendants. The Rosalie site in Missouri was owned by the Houlihan Nursery Company from 1953 to 1980. It was a Missouri corporation until January 1, 1983, when its charter was forfeited and cancelled by the Secretary of State for failure to comply with annual registration requirements. Joseph P. Jr., Edward J. and Ben D. Houlihan were all officers and directors at the time of forfeiture, each owning 20% of the stock in the company. They became statutory trustees of the corporation pursuant to Missouri Revised Statute § 351.525(4). Joseph P. Houlihan Jr. resided at the Rosalie site and gave Grover Callahan permission to dispose of drums containing industrial waste from the generator defendants on the site, assisting him in

court determined the statutory trustees were within one of the four statutorily defined categories of responsible persons.<sup>104</sup>

The court found that imposition of liability upon the statutory trustees was proper because they were the legal representatives of the now defunct corporation.<sup>105</sup> Furthermore, one of the statutory trustees was held personally liable under Section 107(a)(2), as an "owner" and "operator" of the site.<sup>106</sup> The trustees were liable to the extent corporate assets came into their hands.<sup>107</sup> The court concluded the harm was not divisible and capable of apportionment.<sup>108</sup>

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unloading the drums. The United States and State of Missouri contended that the statutory trustees of the Houlihan Nursery company were liable. The defendants argued that if they were liable under CERCLA, joint and several liability applied only to the extent of the corporate property and effects which came into their hands in their capacities as trustees. *Id.* at 1302-1306.

<sup>104</sup>*Id.* at 1306. See CERCLA § 107(a).

<sup>105</sup>*Id.* See SAB Harmon Industries, Inc. v. All State Building Systems, 733 S.W.2d 476, 483 (Mo. App. 1987).

<sup>106</sup>*Id.* Joseph P. Houlihan Jr., as president of the Houlihan Nursery Company and resident at the site, exercised control over the facility, and gave permission for disposal of the hazardous substances on the property. He even assisted in unloading some of the drummed waste. *Id.*

<sup>107</sup>*Id.*

<sup>108</sup>*Id.*



## 2. Realty Trust--U.S. v. Burns

In *United States v. Burns*,<sup>109</sup> the court addressed the issue of trustee liability when the government sought to recover costs incurred in response to the release or threat of release of hazardous substances from a real estate trust for two sites in Gonic, New Hampshire.<sup>110</sup>

The court determined there were two issues: first, whether Crowley could be considered an owner or operator of the site as trustee of the real estate trust; and second, whether he must have personally participated in conduct that violated CERCLA in order to be liable.<sup>111</sup>

Turning to the first issue, the court determined Crowley could be considered an "owner" of the Polythane site,<sup>112</sup> in keeping with the liberal construction of CERCLA "to protect and

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<sup>109</sup>No. C-88-94-L, 1988 U.S. Dist. LEXIS 17340 (D. N.H. Sept. 12, 1988).

<sup>110</sup>*Id.* The defendant, Raymond Crowley, moved for dismissal of the action. He claimed that as the trustee and beneficiary of the Gonic Realty Trust he never owned the land and never personally participated in conduct that violated the statute. In response, the government claimed Crowley was an owner of the site within the meaning of the statute, and that personal participation was not necessary for individual liability under CERCLA. Specifically, the government alleged he was both the sole trustee and beneficiary of the Gonic Realty Trust, which held an industrial site of the Polythane Company when the company disposed of hazardous substances. Thus, he alone had control over the site. *Id.* at \*1-2.

<sup>111</sup>*Id.* at \*3.

<sup>112</sup>*Id.*

preserve public health and the environment."<sup>113</sup> In addition, a broad meaning of "owner" was supported by the legislative history's intent to include "equivalent evidence of ownership."<sup>114</sup> The court relied on the broad interpretation of ownership by stating the position of a trustee was analogous to that of a lessee.<sup>115</sup> It concluded that Congress did not intend for a responsible party to be able to avoid liability through the use of a trust or other forms of ownership.<sup>116</sup>

Moving to the second issue, the court determined Crowley would be liable for response costs irrespective of his personal participation in conduct which violated CERCLA.<sup>117</sup> Three reasons supported this conclusion. First, an owner is liable without

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<sup>113</sup>*Id.* (citing *Dedham Water Co. v. Cumberland Farms Dairy*, 805 F.2d 1074, 1081 (1st Cir. 1986) (an obligation [on the court] to construe its provisions liberally to avoid frustration of the beneficial legislative purposes)).

<sup>114</sup>*Id.* (citing H.R. REP. No. 172, 96th Cong., 2d Sess., 36 (1980), reprinted in 1980 U.S.C.C.A.N. 6160, 6181).

<sup>115</sup>*Id.* at \*3-4 (citing *South Carolina Recycling & Disposal, Inc.*, *supra* note 3, at 1003 (where a lessee/sublessor was considered an owner for purposes of imposing liability under CERCLA § 107); *Maryland Bank & Trust Co.*, *supra* note 3, at 578-80 (holding the security interest exception to liability as an owner to be a narrow exception to a general rule of strict liability)).

<sup>116</sup>*Id.* at \*4 (citing *Shore Realty Corp.*, *supra* note 3, at 1044-45; 3A SCOTT, *supra* note 87, at §§ 265, 265.1 (a trustee holding legal title to the trust property could be liable for obligations as the owner of the property)).

<sup>117</sup>*Id.* at \*5.

being an operator of the facility.<sup>118</sup> Second, no causal relationship must be shown between ownership and disposal under CERCLA.<sup>119</sup> Third, even participation in management by an owner is not required.<sup>120</sup>

### 3. Closely Held Corporate Trust--Quadion Corp. v. Mache

In *Quadion Corp. v. Mache*,<sup>121</sup> the court denied a motion to dismiss a complaint under CERCLA against a trust, its beneficiaries, and its current and previous trustees. It found that as shareholders of a closely held corporation they would be held liable under Superfund, even in the absence of facts which would warrant the piercing of the corporate veil.<sup>122</sup> Plaintiffs

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<sup>118</sup>*Id.* (citing *Shore Realty Corp.*, *supra* note 3, at 1052; *United States v. Stringfellow*, 661 F. Supp. 1053, 1063 (C.D. Cal. 1987)).

<sup>119</sup>*Id.* (citing *Tanglewood*, *supra* note 3, at 1572-73; *Shore Realty Corp.*, *supra* note 3, at 1044; and *Stringfellow*, *supra* note 112, at 1060-61).

<sup>120</sup>*Id.* (citing *United States v. Argent*, 21 Env't Rep. Cas. (BNA) 1354, 1356 (D. N.M. 1984)).

<sup>121</sup>738 F. Supp. 270 (N.D. Ill. 1990).

<sup>122</sup>*Id.* at 274. Prior to 1978, a die-casting facility in Addison, Illinois was owned by Delta Die Casting Company, Inc., which was owned by Delores H. Mache and The John Mache Declaration Trust (the Mache Trust) with 30% and 70% of the shares, respectively. The First National Bank of Des Plaines was the trustee of the Mache trust prior to July 6 1978. On that date, Quadion Corp. purchased all the shares of Delta Die Casting from Delores Mache and the Mache Trust. After acquiring the company, Quadion learned the real property where the facility was located was severely contaminated with deposits of polychlorinated biphenyl (PCB). Plaintiffs contended the defendants permitted and

in Quadion alleged violation of CERCLA, the tort of nondisclosure of a latent defect, negligence, strict liability in tort, breach of warranty or contract, breach of an indemnity agreement, and requested equitable relief.<sup>123</sup>

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ratified the deposit and disposal of PCBs, contaminating the soil, subsoil, property, building, structures and improvements. Quadion gave notice to the defendants that sale of the property was imminent and gave them the choice of cleaning up the property or, if no response was received, reimbursement of Quadion for costs expended in that process. Quadion received no reply and spent \$214,125 on "response" activities. The property was sold to Metalmaster, Inc. Quadion was notified by Metalmaster and Ganton, Inc. (its successor-in-interest) that additional PCB contamination had been discovered. Ganton expended funds for PCB cleanup and demanded Quadion clean up the remaining contamination or be sued. Quadion demanded reimbursement for its initial expenditures and notified defendants of additional contamination, receiving no response to these demands. *Id.* at 272-73.

<sup>123</sup>*Id.* at 272. The parties made the following arguments. First, Quadion sought contribution from defendants as persons "liable or potentially liable," as an owner or operator of a facility at which hazardous substances were disposed. The defendants moved to dismiss the count because they were not owners, as shareholders of a corporation, and there was a failure to allege any requisite degree of control to make them operators. Second, Quadion sought relief for nondisclosure of a latent defect. The defendants asserted the requisite physical harm was not established which was caused by PCBs. Third, Quadion sought relief because of negligence and strict liability. Defendants moved for dismissal of both counts because: (1) no facts justified piercing the corporate veil of Delta Die Casting to confer personal liability on the trustees or Delores Mache; and (2) there was no basis for finding they owed a duty to Quadion. Fourth, Quadion sought relief because of breach of warranty and indemnification. The purchase agreement between Delores Mache and the Mache Trust with Quadion warranted Delta Die Casting had no "liabilities, fixed or contingent, known or unknown . . . ." In addition, the former two parties agreed to indemnify Quadion against any loss, damage or expense suffered as a result of any inaccuracy in or breach of any of the representations, warranties or covenants made by the defendants in the sale agreement. Defendants

The court's test focused on the individual's authority and responsibility to avoid damage to determine whether the closely held corporation was responsible for contribution under Superfund.<sup>124</sup> Under a fact specific analysis, the court found the owners and closely held corporation were not legally distinct and therefore denied the motion to dismiss.<sup>125</sup>

The court then dismissed the claim based on nondisclosure of a latent defect.<sup>126</sup> It concluded it was incongruous to argue there is no damage to other property when a harmful element exists throughout a building, or an area of a building, which by law must be corrected, and at trial may be proven to exist at

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claimed there was no basis for "contingent liability," since the legislation was several years away, and the "known or unknown" language in the warranty clause was ambiguous. Finally, Quadion sought equitable relief on the basis of unjust enrichment as a result of Quadion's payment of the costs of the PCB cleanup, seeking restitution, an equitable accounting, an constructive trust and an equitable lien. Defendants argued a plaintiff cannot state a claim for unjust enrichment when a contract governs the relationship. *Id.* at 272-78.

<sup>124</sup>*Id.* at 274-75. The court evaluated the evidence of an individual's authority to control waste handling practices, such as, *inter alia*, whether the individual holds the position of officer or director, especially where there is a co-existing management position; distribution of power within the corporation, including position in the corporate hierarchy and percentage of shares owned; evidence of responsibility undertaken for waste disposal practices; evidence of responsibility undertaken and neglected; and affirmative attempts to prevent unlawful hazardous waste disposal. *Id.*

<sup>125</sup>*Id.* at 275.

<sup>126</sup>*Id.*

unacceptably dangerous levels.<sup>127</sup>

Regarding the negligence and strict liability claims, the court denied the motion because the allegations of the complaint supported the inference that Delta Die Casting was a closely held corporation, the nature of which was such that stock ownership and company management are often vested in the same person.<sup>128</sup> Thus, the allegations were sufficient because Delta Die Casting could have actively participated or authorized the disposal of PCBs on the property.<sup>129</sup>

The court rejected the motion to dismiss on the basis of breach of warranty and indemnification.<sup>130</sup> It concluded that if the defendants warranted that the business activities of Delta Die Casting would never result in liability under environmental laws in existence, or those passed subsequent to the sale of the company, then the cause of action would not accrue until passage of the laws or the refusal to honor the indemnification.<sup>131</sup>

Finally, the court denied the motion to dismiss on the

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<sup>127</sup>*Id.* (quoting Board of Education of the City of Chicago v. A, C and S, Inc., 131 Ill. 2d 428, 546 N.E. 2d 580 (1989)).

<sup>128</sup>*Id.* (citing National Acceptance Co. v. Pintura Corp., 94 Ill. App. 3d 703, 50 Ill. Dec. 120, 123, 418 N.E. 2d 1114 (2d Dist. 1981) (corporate officer status does not insulate from individual liability for torts of a corporation for which he actively participates)).

<sup>129</sup>*Id.*

<sup>130</sup>*Id.*

<sup>131</sup>*Id.* at 278 (citing Ozark Airlines v. Fairchild-Hiller Corp., 71 Ill. App. 3d 637, 28 Ill. Dec. 277, 390 N.E. 2d 444 (1st Dist. 1979)).

basis of unjust enrichment.<sup>132</sup> It found unjust enrichment was not inconsistent with a contractual claim.<sup>133</sup> Thus, plaintiffs may raise as many claims actionable regardless of their consistency.<sup>134</sup>

#### 4. Corporate Liquidating Trust

##### a. Rollins Environmental Services (FS), Inc. v. Wright

In *Rollins Environmental Services (FS), Inc. v. Wright*,<sup>135</sup> the court denied the motion to dismiss and found that personal jurisdiction over trustees was present and there was no violation of the due process rights of the defendants. Furthermore, a valid claim was stated even without alleging that a contract existed.<sup>136</sup>

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<sup>132</sup>*Id.*

<sup>133</sup>*Id.*

<sup>134</sup>*Id.* The court relied on *Braman v. Woodfield Gardens Associates*, 715 F. Supp. 226, 229 (N.D. Ill. 1989) (citing Fed. R. Civ. P. 8(e)(2)).

<sup>135</sup>738 F. Supp. 150 (D. Del. 1990).

<sup>136</sup>*Id.* at 155. Rollins brought the breach of contract against the trustees of the Ehlco Liquidating Trust, which was formed in January 1989 to wind up the affairs of Edward Hines Lumber Company. Rollins and Hines were both Delaware corporations. Hines filed a certificate of dissolution, continuing its corporate existence for three years to prosecute and settle suits and close its business. Rollins and Hines entered into an agreement in May 1988, whereby Rollins agreed to perform environmental cleanup work at the Mid-South Wood Products Superfund Site in Mena, Arkansas, which was owned by Hines. Rollins began in June 1988 and

With respect to *in personam* jurisdiction, the court used a two step analysis.<sup>137</sup> First, it determined whether the relevant statute established jurisdiction.<sup>138</sup> Second, it determined whether service complied with the Due Process Clause of the Fourteenth Amendment.<sup>139</sup>

While the court acknowledged there was no explicit reference to liquidating trusts in the Delaware Director's Consent Statute,<sup>140</sup> it relied on precedent in the Delaware Court of Chancery to support its conclusion that the General Assembly

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intended to finish by November 1988. Delays prompted Rollins to petition the Delaware Court of Chancery for the appointment of trustees to take title to the property in December 1988, one month before Hine's corporate existence would terminate by operation of law. The court appointed the three trustees of Ehlco, all residents of Illinois, and without business dealings in Delaware other than their duties as trustees. Rollins continued the cleanup in Mena and sought compensation from the trustees rather than Hines. After completion of the cleanup in July 1989, Rollins negotiated unsuccessfully for additional compensation with the Ehlco trustees until December 13, 1989. In the first step of the analysis, the trustees argued the applied solely to individuals of authority in corporations, not to liquidating trusts. Next, that even if the statute applied to them, service of process violated their due process rights because they lacked sufficient contacts with the state of Delaware. The defendants argued that Delaware law required dismissal of a complaint that alleged a breach of contract without alleging the existence of a contract. *Id.* at 151-52.

<sup>137</sup>*Id.*

<sup>138</sup>*Id.*

<sup>139</sup>*Id.* See U.S. CONST. amend. XIV.

<sup>140</sup>*Id.* note 3 (quoting DEL. CODE ANN. tit. 10, § 3114 (Supp. 1992)).



had corporate liquidating trusts in mind.<sup>141</sup> Thus, the statute applied to trustees and established jurisdiction.<sup>142</sup>

The court stated the Due Process Clause protects an individual's interest in not being subject to binding judgments of a forum in which he has established no meaningful "contacts, ties, or relations"<sup>143</sup> to give the individual "fair warning"<sup>144</sup> of being subjected to the jurisdiction of a given state.<sup>145</sup> The court reasoned that since the trustees of Ehlco voluntarily agreed to serve as trustees under Delaware law, specific jurisdiction applied.<sup>146</sup> Furthermore, the defendants purposefully established "minimum contacts," having sought the protection of the Delaware court of Chancery to derive benefit in the amount of \$2000 per month for each trustee.<sup>147</sup> The court

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<sup>141</sup>*Id.* (citing *Gans v. MDR Liquidating Corp.*, Civil Action No. 9630, mem. op. at 2, (Del. Ch., Jan. 10, 1990)).

<sup>142</sup>*Id.*

<sup>143</sup>*Burger King Corp. v. Rudzewics*, 471 U.S. 462, 471-72 (1985) (quoting *International Shoe v. Washington*, 326 U.S. 310, 319 (1945)).

<sup>144</sup>*Id.* at 472.

<sup>145</sup>*Rollins*, *supra* note 135, at 153.

<sup>146</sup>*Id.* at 153. Two categories of contacts satisfy the requirements of due process. Specific jurisdiction is derived from contacts which are purposefully directed by the defendant, but general jurisdiction applies when the forum seeks to assert jurisdiction based on the defendant's continuous and systematic contact with the forum state. *Id.* at 152-53 (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 416 (1984)).

<sup>147</sup>*Id.* See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

determined exercise of *in personam* jurisdiction over the trustees did not offend the traditional notions of "fair play and substantial justice," because the trustees knew at the time they accepted their appointment they would stand in the shoes of the corporation to resolve any outstanding claims.<sup>148</sup> Therefore, the due process rights of the Ehlco trustees were not violated.<sup>149</sup>

Finally, the court addressed the issue of failure to state a claim.<sup>150</sup> Strict pleading was not required.<sup>151</sup> The threshold of inferring existence of a contract was met by the plaintiffs through the existence of a written agreement.<sup>152</sup> Accordingly, the motion of defendants was denied.<sup>153</sup>

b. Waste Management of Wisconsin, Inc. v. Uniroyal, Inc.

The court in *Waste Management of Wisconsin, Inc. v.*

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<sup>148</sup>*Id.* The court recalled *Shaffer v. Heitner*, 433 U.S. 186, 214 (1977) and noted Delaware's failure to assert a strong interest under a statute that predicated jurisdiction over corporate directors on the location of property in Delaware, rather than the status as directors. Hence, the Delaware Director's Consent Statute predicated jurisdiction on status as trustees. *Supra* note 140.

<sup>149</sup>*Id.* at 155.

<sup>150</sup>*Id.*

<sup>151</sup>*Id.*

<sup>152</sup>*Id.* See *supra* note 136; *Goodrich v. E.F. Hutton Group, Inc.*, 542 A.2d 1200, 1203-04 (Del.Ch. 1988); and Fed. R. Civ. P. 8 and 84.

<sup>153</sup>*Id.* at 156.

Uniroyal, Inc.<sup>154</sup> denied motions of trustees of a liquidating trust to dismiss for lack of personal jurisdiction and failure to state a claim for which relief could be granted, in an action brought for past and future costs of response at two Superfund sites. This permitted the plaintiff to seek the costs of response and damages incurred and a declaration of liability concerning future costs against Alan R. Elton, Joseph P. Flannery, John R. Graham and Joseph L. Rice III, as Trustees of CDU Holding, Inc., Liquidating Trust.<sup>155</sup>

The first issue the court addressed was whether the Trustees were subject to its personal jurisdiction.<sup>156</sup> It determined that CERCLA did not provide for nationwide service of process by the

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<sup>154</sup>1992 U.S. Dist. LEXIS 12003 (W.D. Wis. June 2, 1992).

<sup>155</sup>*Id.* at \*1. Beginning in 1955, U.S. Rubber owned and operated a plant at Stoughton, Wisconsin, that manufactured coated plastic material used in auto seat covers. The production process involved the use of solvents and other chemicals, resulting in spent solvents, solvent sludge and dry waste scrap disposed of at the Hagen Farm and City Disposal sites. In 1985, Uniroyal transferred a portion of its business to Uniroyal Plastics Company, Inc. Following several complex transfers, mergers, and corporate transactions, on December 2, 1986, certificates of dissolution were filed for Uniroyal and CDU Holding. Upon dissolution, certain assets were transferred to CDU Holding Liquidating Trust. The trustees were in the process of winding up the affairs of Uniroyal and CDU Holding. All the trustees were former officers or directors of Uniroyal. Waste Management sought to hold the defendants Uniroyal Holding, CDU Holding, and the Trustees liable for costs of response and damages incurred up to that time at its landfill, together with future response costs as successors to the defendant Uniroyal. The Trustees moved for dismissal. *Id.* at \*3-11.

<sup>156</sup>*Id.* at \*11. See *United States v. Distler*, 741 F. Supp. 643 (W.D. Ky. 1990), *Levin Metals v. Parr-Richmond Terminal Co.*, 817 F.2d 1448 (9th Cir. 1987), and *United States v. Sharon Steel Corp.*, 681 F. Supp. 1492 (D. Utah 1987) (generally discussing successor corporate liability under CERCLA § 107).

United States.<sup>157</sup> The court determined the application of the long arm statute of Wisconsin was appropriate and found jurisdiction.<sup>158</sup>

In addition, the court determined the contacts of the defendants were sufficient to comply with due process under the Fourteenth Amendment.<sup>159</sup> It found this did not offend the traditional notions of fair play and substantial justice to bring successor defendants into a forum where they were permitted to do business in the state.<sup>160</sup> As a result, the court denied the motion to dismiss.<sup>161</sup>

The second issue addressed by the court was whether the complaint should be dismissed against CDU Holding for failure to state a claim for which relief could be granted.<sup>162</sup> It found

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<sup>157</sup>Id. at \*12 (citing FED. R. CIV. P. Rule 4(e)).

<sup>158</sup>Id. at \*14-15. The successor defendants, including the CDU Holding Liquidating Trust, assumed all responsibility for the liabilities incurred by Uniroyal, Inc. for generating and disposing of materials containing hazardous substances which were released into the environment at the two sites. The transfer of assets, merger, and reorganization justified the inference of responsibility for those liabilities arising in Wisconsin. Id. at \*13-14.

<sup>159</sup>Id. at \*15-16. See U.S. CONST. amend. XIV.

<sup>160</sup>Id. at \*16. The court noted that as far back as 1955 liquid waste products were generated that resulted in placement of the two sites on the national priorities list. Id.

<sup>161</sup>Id.

<sup>162</sup>Id. at \*16-17. The court determined that Rule 17(b) of the FED. R. CIV. P. did not apply to the extent that it would relieve CDU holding of liability because it was dissolved under Delaware law. It further found *Levin Metals*, supra note 156, at 1448, unpersuasive, which stated that under California law the corporate defendant no longer had the capacity to be sued. Id.

CERCLA preempts state dissolution proceedings.<sup>163</sup> The actions of the Trustees as a successor in interest did not automatically relieve Uniroyal or CDU Holding of liability.<sup>164</sup>

## 5. Bank Trust

### a. Phoenix I

The court in *Phoenix v. Garbage Service Co.*<sup>165</sup> did not dismiss the city's suit to recover cleanup costs under CERCLA from a bank that acted as trustee for an estate that held title to a landfill. Even though status as trustee alone did not trigger liability as facility owner, the possibility the bank may have taken other actions that could bring the institution within the definition of facility owner under CERCLA justified denial of the partial summary judgment motion.<sup>166</sup>

In addressing the issue of whether VNB as trustee was an

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<sup>163</sup>*Waste Management*, *supra* note 154, at \*17.

<sup>164</sup>*Id.*

<sup>165</sup>33 Env't. Rpt. Cas. (BNA) 1655 (D. Ariz., Apr. 5, 1991) (hereinafter *Phoenix I*). The unpublished opinion was by Judge Rosenblatt.

<sup>166</sup>*Id.* The city filed to recover response costs incurred in cleaning up an allegedly contaminated landfill site which it acquired during condemnation proceedings. VNB asserted that as executor, when it exercised the option to purchase the landfill in behalf of the testamentary estate and received a warranty deed in its capacity as trustee, it possessed none of the rights of ownership. For that reason, it was not an owner within the meaning of CERCLA. *Id.* at 1655-56.

"owner" within the meaning of CERCLA,<sup>167</sup> the court granted the partial summary judgment motion for VNB with respect to the claim of ownership as executor and receiving title as trustee.<sup>168</sup> It denied VNB's motion to dismiss, however, to the extent a trier of fact could determine VNB possessed other indicia of ownership to bring it within CERCLA's liability.<sup>169</sup>

#### b. Phoenix II

In a subsequent opinion involving the same parties, the court in *Phoenix v. Garbage Service Co.*<sup>170</sup> squarely addressed the

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<sup>167</sup>*Id.* It recognized five principles. First, the law must be liberally construed to meet its remedial objectives. Second, those responsible for disposing of hazardous substances bear the burden of response costs. Third, owners and operators of disposal facilities are strictly liable for cleanup costs. Fourth, the term owner or operator is defined by ordinary, common law meaning. Fifth, the determination of ownership must be fact specific, depending on substance and activities undertaken. Against that standard, the court reached four conclusions. First, no liability attached to VNB solely as executor. Second, no liability attached to VNB solely by receiving the warranty deed as trustee. Third, a question of material fact existed concerning whether VNB satisfied the indicia of ownership in its capacity as executor or testamentary trustee. Finally, either as a trustee or executor VNB could be found to have been an owner under CERCLA. *Id.*

<sup>168</sup>*Id.*

<sup>169</sup>*Id.*

<sup>170</sup>*Phoenix II, supra* note 4, at \*1. The opinion was written by Judge Conti. *Id.* at \*1. The court did not believe the holding was inconsistent with the memorandum and order in *Phoenix I*. That order held only that VNB could not be held liable as trustee without further evidence of its status as trustee in addition to the warranty deed. Furthermore, the motion to reconsider of the City of Phoenix was granted to the extent the court in *Phoenix I* implied a trustee was not an owner under

issue of the liability of the trustee under CERCLA. It held the trustee bank was liable under CERCLA as an "owner" of the landfill, but was not liable under CERCLA as an "operator."<sup>171</sup>

The court first addressed the liability of VNB as an operator of the landfill.<sup>172</sup> In *Phoenix II*, the court stated VNB was not involved at all in the daily administration of the landfill and, therefore, VNB was not liable as an "operator."<sup>173</sup>

Next, the court analyzed the liability of VNB as an "owner" of the landfill.<sup>174</sup> The first part of the analysis addressed specifically the liability as trustees under CERCLA.<sup>175</sup> It framed the question as whether a trustee, as holder of legal title to property, may be held liable for cleanup costs as "owner," even though he played no role in the contamination of the property.<sup>176</sup> The court stated it was beyond dispute that there was no culpability requirement for ownership liability

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CERCLA by virtue of legal title only. *Phoenix II*, note 3, at \*10-11. See "Bare Legal Title" Sufficient Without More to Hold Trustee Liable, *Federal Court Decides*, 7 *Toxics L. Rep.* (BNA) 1092 (Feb. 17, 1993) (discussing *Phoenix II*).

<sup>171</sup>*Id.* at \*13.

<sup>172</sup>*Id.* at \*4. VNB contended it was not an "operator" under CERCLA, but the City of Phoenix contended the alleged status as trustee gave VNB the "authority to control" the landfill, making it liable. *Id.*

<sup>173</sup>*Id.* at \*6.

<sup>174</sup>*Id.*

<sup>175</sup>*Id.*

<sup>176</sup>*Id.*

under CERCLA.<sup>177</sup> In addition, the court relied on legislative history<sup>178</sup> and commentators<sup>179</sup> to support the proposition that the term "owner" under CERCLA includes trustees who hold legal title only. It construed the only exception to title holder liability to be that found in the statute which permits protection of the security interest.<sup>180</sup> Furthermore, the court relied on the EPA's practice of arguing that trustees are "owners" within the meaning of CERCLA, and found the EPA was entitled to considerable deference.<sup>181</sup> It rejected the argument of VNB that the EPA took

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<sup>177</sup>*Id.* at \*6-7 (see Nurad, *infra* note 198, at 846 (the trigger to liability under CERCLA § 107(a)(2) is ownership or operation of a facility at the time of disposal, not culpability or responsibility for the contamination"); *Monsanto*, *supra* note 3, at 168 (the traditional elements of tort culpability . . . simply are absent from the statute"))).

<sup>178</sup>*Id.* at \*7 (citing H.R. REP. No. 172, 96th Cong., 2d Sess. 36, reprinted in 1980 U.S.C.C.A.N. 6160, 6181).

<sup>179</sup>*Id.* at \*8 (see Denise Rodosevich, *The Expansive Reach of CERCLA Liability: Potential Liability of Executors of Wills and Inter Vivos and Testamentary Trustees*, 55 ALB. L. REV. 143, 173 (1991); Joel Moskowitz, *Trustee Liability Under CERCLA*, 21 ELR 10003 (1991)).

<sup>180</sup>*Id.* (quoting CERCLA § 101(20)(A)).

<sup>181</sup>*Id.* (see *Lone Star Industries, Inc. v. Horman Family Trust*, 960 F.2d 917, 921 (10th Cir. 1992) (EPA sent formal notice to the trustee, *inter alia*, on July 26, 1989, informing of status as PRP under CERCLA)). In *Lone Star*, the court reversed a lower court judgment rendered in *Lone Star v. Horman Family Trust*, No. 89-C-957G, 1990 U.S. Dist. LEXIS 19287 (C.D. Utah May 31, 1990), in which the lower court dismissed the claim of *Lone Star* against the defendants *Horman Family Trust*, *Sidney M. Horman*, as Trustee of the *Horman Family Trust*, *Lawrence D. Williamsen*, and the *Williamsen Investment Company*. The plaintiffs asserted a contribution claim under CERCLA § 113(f) and a cost recovery claim under § 107(a). The sole issue was whether the district court was correct in holding the complaint failed to state a claim upon which relief could be granted under Fed. R. Civ. P. 12(b)(6). *Id.* Since the Tenth Circuit did not discuss trustee



the position that "innocent trustees or fiduciaries are not liable under CERCLA."<sup>182</sup> The proposed rule, in the opinion of the court, dealt only with the liability of secured creditors.<sup>183</sup> Therefore, the court held that a trustee is an "owner" for the purposes of Section 107 of CERCLA, even though the trustee may hold only bare legal title.<sup>184</sup>

In the second part of the "owner" analysis, the court reviewed the status of VNB as trustee.<sup>185</sup> The court was persuaded by the rationale of the City of Phoenix that VNB was collaterally estopped from asserting it was not an "owner."<sup>186</sup>

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liability, other than to inform the parties of potential liability, a longer analysis is not required in this discussion.

<sup>182</sup>*Id.* at \*9 (relying on 57 Fed. Reg. 18,343, 18,349 (1992) (to be codified at 40 C.F.R. §§ 300.100 and 300.110.5)).

<sup>183</sup>*Id.* "It is not controlling where a trustee is not also a secured creditor." *Id.*

<sup>184</sup>*Id.* at \*10. While the court acknowledged the difficulty in assessing liability in excess of the value of the trust's assets, the degree of culpability had nothing to do with owner/operator liability under CERCLA. It concluded with the statement that "[i]f Congress had meant to exempt uninvolved trustees from liability as 'owners' under CERCLA, it would have said so in the statute." *Id.*

<sup>185</sup>*Id.* at \*11. VNB acknowledged it acted as fiduciary of the estate of Mr. Estes, but argued it never accepted the position as trustee of the testamentary trust. In response, the City of Phoenix argued the position taken by VNB in an earlier condemnation proceeding collaterally estopped VNB from denying it was trustee. *Id.*

<sup>186</sup>*Id.* In particular, it relied on the fact that the issue of ownership as trustee was decided by the court in the 1980 condemnation action, which held VNB was the record owner of the landfill. *Id.* It rejected the argument that collateral estoppel could not be applied because VNB was a party to the previous proceeding only as a fiduciary. Therefore, it determined VNB was liable as an "owner" under Section 107 of CERCLA. *Id.* at \*12-13.

### C. Not Liable

#### 1. Land Trust--Premium Plastics v. LaSalle National Bank

The court in *Premium Plastics v. LaSalle National Bank*<sup>187</sup> granted summary judgment for the defendant holding that, as trustee, it was a title holder and not an owner or operator under CERCLA. The court denied plaintiff's claims under the Illinois Contribution Among Joint Tort Feasers Act<sup>188</sup> and for contribution for the creation of a public nuisance.<sup>189</sup>

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<sup>187</sup>1992 U.S. Dist. LEXIS 16119 (N.D. Ill. October 22, 1992), *motion for reconsideration denied*, 1992 U.S. Dist. LEXIS 19787 (N.D. Ill. December 29, 1992). Accord, *United States v. Peterson Sand and Gravel, Inc.*, 806 F. Supp. 1346, 1358-59 (E.D. Ill. 1992) (holding a trustee liable does not serve the ends of CERCLA; innocent landowners are not liable under CERCLA; being an Illinois land trustee is not owning land under CERCLA); *United States v. NL Industries*, 1992 U.S. Dist. LEXIS 17207, slip. op. (S.D. Ill. 1992).

<sup>188</sup>*Id.* (citing ILL. REV. STAT. ch. 70, § 301 (1991)).

<sup>189</sup>*Id.* From November 4, 1966 to July 28, 1988, LaSalle was the trustee of property located in Chicago, Illinois. Henry Crown and Company (HC&Co.) and its partners were beneficiaries of the trust. LaSalle leased the site to Sherwin at the direction Of HC&Co. in March of 1968. From that time until May 1986 the site was operated as a paint warehouse and distribution center. During that time, hazardous substances and hazardous wastes came to the site. LaSalle transferred title to the site to Lake Shore at HC&Co.'s direction on July 28, 1988 and conveyed the beneficial interest of HC&C to Raymond J. Spinner, Gerald R. Spinner, and Neil E. Spinner. After taking over operations in July 1988, Premium discovered the site was contaminated and retained counsel and environmental consultants to conduct an evaluation of the site. They estimated the release or threatened release of hazardous substances or wastes and the type of removal and remedial action required with the National Contingency Plan. After spending over \$100,000 in cleanup costs, plaintiffs filed suit. The plaintiffs sought contribution for costs in excess of their pro-rata share paid to remedy contamination allegedly

The court dismissed the contribution claim.<sup>190</sup> It determined plaintiffs had no independent right of action for allocation of costs because there was no claim by a third party.<sup>191</sup> The court analysis recognized that outside of relationships based on legal title, a land trustee's title has little significance.<sup>192</sup> Because LaSalle was only a title holder, and took no active part in the property or venture, it was not an owner or operator.<sup>193</sup> For that reason, plaintiffs could not impose liability on LaSalle.<sup>194</sup>

In addition, the court rejected the argument by plaintiffs that if the summary judgment was granted against LaSalle, other defendants would file motions claiming they were not owners.<sup>195</sup> The court looked to the plain language of the trust agreement, which stated that HC&Co. was considered owner of the site in all respects except title.<sup>196</sup> Therefore, it refused to "subject an

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caused by defendants. They contended the liability of LaSalle arose from holding the site as land trustee when hazardous substances were deposited. LaSalle moved for summary judgment because the "owner" in a land trust was the beneficiary. *Id.* at \*2-3.

<sup>190</sup>*Id.* at \*4.

<sup>191</sup>*Id.*

<sup>192</sup>*Id.* at \*10. See *supra* note 188.

<sup>193</sup>*Id.* at \*10-11.

<sup>194</sup>*Id.*

<sup>195</sup>*Id.* at \*11. This would leave plaintiffs with no parties from whom to seek contribution and recovery. *Id.*

<sup>196</sup>*Id.*

innocent party such as LaSalle to liability just to assure plaintiffs could recover their expenses."<sup>197</sup>

## 2. Contingent Remaindermen of Family Trust

### a. Nurad, Inc. v. Wm. E. Hooper & Sons--

#### The District Court Decision

In *Nurad, Inc. v. Wm. E. Hooper & Sons*,<sup>198</sup> the district court granted the summary judgment motion of the defendants, James E. Hooper Jr. and Lawrence Hooper, holding they were not liable under CERCLA as beneficiaries (contingent remaindermen in a family trust). The dispute concerned their liability as owners and operators when their father controlled the majority shares of stock in the trust and was responsible for daily management of the contaminated site.<sup>199</sup> The court determined that the

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<sup>197</sup>*Id.* at \*12.

<sup>198</sup>1991 U.S. Dist. LEXIS 17090 (D. Md. Aug. 15, 1991) *aff'd in part, rev'd in part, and remanded*, 966 F.2d 837 (4th Cir. 1992).

<sup>199</sup>*Id.* at \*22-24. The case concerned liability arising from the existence of seven Underground Storage Tanks (USTs) located in Baltimore, Maryland at the Nurad site. Nurad owned an antenna manufacturing facility and a connected group of buildings installed by the Hooper Company at the Hooperwood Mills. Hooper owned the site and surrounding properties at the Hooperwood Mills from 1905 to November 30, 1963. Until the sale in 1963, Hooper Company ran a textile manufacturing operation at the Hooperwood Mills involving flameproofing and waterproofing of canvas. During these operations, Nurad alleged Hooper Company used chemicals and stored them in two of the USTs from as early as 1935 until 1962. The Hooperwood Mills were sold in 1963 to Property Investors, Inc. The successor corporation to Property

defendants, Lawrence Hooper and James E. Hooper Jr., were not owners or operators and, therefore, not liable under CERCLA.<sup>200</sup> Because of the dual role of the defendants as officers of the company and contingent remaindermen of the trust,<sup>201</sup> the court

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Investors was Monumental Enterprises. In 1966 the Hooper Company leased two buildings on the Nurad site to conduct a small finishing operation. In 1976 Monumental sold Hooperwood Mills and the Nurad site in 1976 to Kenneth B. Mumaw, who subdivided it into three parcels, selling one to Nurad. Nurad learned in the fall of 1988 that at least one of the USTs contained hazardous substances. In December 1988 Nurad hired two firms to perform historical research of the site and to identify and analyze the contents of the tanks, conduct tank closures, cleaning and sealing. Nurad claimed response costs of \$277,680.77, but did not claim to have developed a permanent remedy. Nurad initiated the action under CERCLA to recover costs incurred and to be spent responding to alleged releases and threats of release from the USTs. It sought partial summary judgment and a declaration that defendants were jointly and severally liable. The defendants James E. Hooper Jr. and Lawrence Hooper opposed these motions. *Id.* at \*1-9.

<sup>200</sup>*Nurad*, *supra* note 198, at \*31-33. First, the court determined that the Nurad property was a "facility" within the meaning of CERCLA. Second, the court determined that based on uncontroverted evidence, Nurad demonstrated an actual release occurred on the site. Third, the court determined that Nurad demonstrated the necessary nexus between the release or threatened release of hazardous substances that caused it to incur response costs. The facts were not in dispute concerning the individual association with the site of the Hooper brothers. Both worked in the Hooperwood Mills as teenagers and learned the company used solvents to coat fabrics. They worked for the company as salesmen outside of Maryland from 1947 to 1961. For two years they left the company, returning in 1963, when they became vice presidents. During their two year absence, they remained as members of the Board of Directors of the Hooper Company. *Id.* at \*12-23.

<sup>201</sup>*Id.* at \*23-24. Both were contingent remaindermen beneficiaries of the Robert P. Hooper Trust, administered by their father, James E. Hooper Sr., as sole trustee, from 1958 until his death in 1977. The Trust held a majority of the voting stock in the company. From 1958 to 1969, their father was president of the Hooper Company. He ran the daily affairs of the business until he resigned in 1969 to become Chairman of the Board and Chief Executive Officer, which he performed until his

went on to review their role as beneficiaries of the trust to determine if they were liable independent of their capacity as directors.<sup>202</sup> It determined that neither had the ability or capacity to exercise control over the operations.<sup>203</sup> James Sr. was president, retained all decision-making authority, and ran the daily operations of the finishing plant.<sup>204</sup> He also provided all instructions on sale of the property and voted the majority stock interest of the company in his capacity as trustee.<sup>205</sup> Undisputed evidence established that James Sr. was solely responsible for running the company and made all major corporate decisions by voting the majority of shares of stock placed in trust after his father's death.<sup>206</sup> For these reasons, the court declined to interpret CERCLA so broadly as to hold the defendants liable, since neither controlled or had the ability to control the operations at the site prior to its sale.<sup>207</sup>

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death in 1977. Each defendant separately owned additional shares of non-voting preferred stock in the company prior to 1963. James Jr. followed his father as president in 1969. *Id.*

<sup>202</sup>*Id.*

<sup>203</sup>*Id.*

<sup>204</sup>*Id.*

<sup>205</sup>*Id.* at \*30-31.

<sup>206</sup>*Id.* at \*31, note 23. James Sr. was a man of strong will and temperament who ran the entire affairs of the corporation. *Id.* Hooper Appendix A, Finney Aff. at para. 5.

<sup>207</sup>*Id.* at \*31-33.

b. Nurad--The Fourth Circuit Decision

It is important for this discussion to consider the decision of the Fourth Circuit in *Nurad, Inc. v. Wm. E. Hooper & Sons*,<sup>208</sup> that upheld the decision of the lower court that James Hooper Jr. and Lawrence Hooper were not operators under CERCLA in their capacities as corporate directors. The appellate court did not engage in an explicit discussion of trustee liability or beneficiary liability.<sup>209</sup>

The court agreed with the lower court that the Hooper brothers lacked the requisite authority to control the USTs or to prevent the disposal of hazardous waste at the site.<sup>210</sup> This

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<sup>208</sup>966 F.2d 837 (4th Cir. 1992).

<sup>209</sup>*Id.* The court did, however, consider several other issues. First, it addressed the claims of Nurad against the former tenants at the site. It rejected the three objections raised: (1) that the district court applied the wrong legal standard in interpreting the word "operator"; (2) that the district court erroneously interpreted the word "facility"; and (3) that the district court erred in its factual determination that the tenant defendants lacked the authority to control the USTs. Second it addressed the claims against the previous owners of the site, the Hooper Company and Kenneth Mumaw. The Fourth Circuit determined that the lower court was correct in concluding the Hooper Company was liable because it actively disposed of hazardous substances and then abandoned them in the USTs. It disagreed with the conclusion that Mumaw was not liable because the passive migration of hazardous substances may have occurred during his ownership since he did not take an active role in managing the tanks or their contents. It found the restrictive construction of "disposal" of hazardous wastes "ignores the language of the statute, contradicts clear circuit precedent, and frustrates the fundamental purposes of CERCLA." CERCLA § 101(29). Finally, the court affirmed the lower court's denial of the Hooper Company's claim that there was no statutory disposal. *Id.* at 842-846.

<sup>210</sup>*Id.* at 844.

assumed that a corporate officer could be held personally liable as operator.<sup>211</sup> But the court relied on the fact that while they were vice presidents of the Hooper Company since the early 1960s, any authority they possessed was subordinate to that of their father.<sup>212</sup> In addition, the court emphasized the father's unwillingness to cede authority to his sons.<sup>213</sup> It found that "James Hooper Sr., as president during the relevant times, retained all decision-making authority over the company, including the daily operations at the finishing plant."<sup>214</sup> Therefore, the Hooper brothers should not face CERCLA liability.<sup>215</sup>

### 3. Avoiding Liability as Trustee--

#### Con-Tech Sales Defined Benefit Trust v. Cockerham

In *Con-Tech Sales Defined Benefit Trust v. Cockerham*,<sup>216</sup> the trustee successfully avoided liability by testing the property for contamination and initiating a cleanup.<sup>217</sup> The court denied the motions for summary judgment of defendants where the

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<sup>211</sup>*Id.*

<sup>212</sup>*Id.*

<sup>213</sup>*Id.*

<sup>214</sup>*Id.* See *supra* note 206, at \*31, note 23.

<sup>215</sup>*Id.*

<sup>216</sup>1991 U.S. Dist. LEXIS 14624 (E.D. Pa. October 9, 1991).

<sup>217</sup>*Id.*



plaintiff sought to recover CERCLA response costs and assess liability for future expenses.<sup>218</sup>

Initially the court analyzed the retroactivity of the 1990 NCP.<sup>219</sup> The amendment by EPA became important because the 1990

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<sup>218</sup>*Id.* at \*5. Plaintiffs purchased the property in Exton, Pennsylvania (Exton Parcels) in May 1986 from the Cockerhams. Excavations in September 1986 discovered a trench filled with hazardous wastes which had allegedly been produced in Malvern, Pennsylvania and trucked to the site by the Cockerhams. Plaintiffs employed an engineering firm which found more contaminated trenches and then plaintiffs contacted the Pennsylvania Department of Environmental Resources (DER) and the EPA. At the direction of DER, plaintiffs removed 9700 tons of waste. Approximately 4700 tons remained on the Exton Parcels. Suit was initiated in August 1987 to recover \$1.6 million in response costs incurred and to assess liability for future expenses. The Cockerham defendants sought partial summary judgment on the basis that no legal obligation existed to defray the response costs incurred, because the plaintiffs allegedly conducted their cleanup efforts in a manner inconsistent with CERCLA's National Contingency Plan (NCP). The court determined that to decide the summary judgment motion required resolution of three issues: (1) which NCP applies; (2) the standard of compliance required of plaintiffs; and (3) whether the response action of plaintiffs was a removal or remedial action. It concluded that since there was sufficient evidence to support the possibility that the costs were consistent with the NCP's removal action requirements, there was a genuine issue of material fact which supported denial of the motion. *Id.* at \*5-8. See *Con-Tech Sales Defined Benefit Trust v. Cockerham*, No. 87-5137, Slip Opinion (E.D. Pa. January 18, 1991) (denying summary judgment on issues of corporate successor liability and contractual assumption of liability); *Con-Tech Sales Defined Benefit Trust v. Cockerham*, 715 F. Supp. 701 (E.D. Pa. 1989) (motion to dismiss Hannig & Rudolph's third party complaint denied); *Con-Tech Sales Defined Benefit Trust v. Cockerham*, 698 F. Supp. 1249, 1250-51 (E.D. Pa. 1988) (motion to dismiss third-party complaint and amended complaint against NRM-Ohio denied).

<sup>219</sup>*Id.* at \*9. Pursuant to CERCLA § 107(a)(4)(B), responsible parties are liable for "any other necessary costs incurred by any other person consistent with the national contingency plan." *Id.*

version<sup>220</sup> requires "substantial compliance" with the appropriate regulations to be consistent with the NCP, whereas the 1985 version<sup>221</sup> required "strict adherence" to a list of requirements.<sup>222</sup> The court found that the 1990 NCP applied to the evaluation of plaintiff's claims, but the 1985 NCP applied to the extent the 1990 NCP imposed additional requirements.<sup>223</sup>

The court next adopted the "substantial compliance" rather than the "strict compliance" standard for consistency with the NCP.<sup>224</sup> It determined the response action of the plaintiff would be consistent with the NCP if the action, when evaluated as a whole, was in substantial compliance with the applicable requirements of the NCP and resulted in a CERCLA-quality cleanup.<sup>225</sup>

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<sup>220</sup>40 C.F.R. 300.700 (1990), 55 Fed Reg. 8,839 (Mar. 8, 1990).

<sup>221</sup>40 C.F.R. § 300.71 (1988), 50 Fed. Reg. 47,912 (November 20, 1985).

<sup>222</sup>*Con-Tech*, *supra* note 216, at \*9.

<sup>223</sup>*Id.* at \*10.

<sup>224</sup>*See supra* nn. 219-23.

<sup>225</sup>*Con-Tech*, *supra* note 216, at \*19 (citing 40 C.F.R. 300.700(c)(3)(i) (1990)). Under the alter/clarify test, the court believed substantial compliance was meant to clarify the meaning of "consistent with the NCP", not to add a new provision. *Id.* at \*17, note 5 (citing *Versatile Metals, Inc. v. Union Corporation*, 693 F. Supp. 1563 (E.D. Pa. 1988)).

## V. LEGISLATIVE RESPONSES

### A. Weldon: Innocent Landowner Defense

A bill introduced by Rep. Curt Weldon (R-Pa.), H.R. 570,<sup>226</sup> entitled the "Innocent Landowner Defense Amendment of 1993,"<sup>227</sup> would amend CERCLA<sup>228</sup> to provide specific requirements for the "innocent landowner" defense. It would apply to trustees and other entities who acquire contaminated property. The bill defines the requirement that a purchaser of real property make all appropriate inquiry into the previous ownership and uses of the real property in order to qualify for the "innocent landowner" defense.<sup>229</sup> It would permit the defendant who acquired real property to establish by a rebuttable presumption that he has made all appropriate inquiry if immediately prior to or at the time of acquisition he obtained a Phase I Environmental Audit.<sup>230</sup> The Audit would be performed by an "environmental

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<sup>226</sup>H.R. 570, 103rd Cong., 1st Sess. (1993). The bill was introduced on January 25, 1993 and referred to the Committee on Energy and Commerce. A version of the bill was introduced previously as H.R. 2787, 101st Cong., 1st Sess. (1989).

<sup>227</sup>*Id.* at § 1.

<sup>228</sup>CERCLA § 101(35).

<sup>229</sup>H.R. 570 at § 2. The bill would redesignate subparagraphs (C) and (D) of CERCLA as subparagraphs (D) and (E), and insert after subparagraph (B) a new subparagraph (C).

<sup>230</sup>*Id.* at (C)(i).

professional,"<sup>231</sup> in order "to determine or discover whether there is presence or likely presence of a release or threatened release of hazardous substances on the real property."<sup>232</sup>

The Phase I Audit would require review of information about previous ownership and uses of the real property.<sup>233</sup> These include a review of recorded chain of title documents regarding real property for a period of 50 years,<sup>234</sup> reasonably available aerial photographs,<sup>235</sup> recorded environmental cleanup liens,<sup>236</sup> reasonably obtainable governmental records which document releases,<sup>237</sup> and a visual site inspection of the property and immediately adjacent properties.<sup>238</sup> These searches would determine whether reasonably available documented or visual evidence of hazardous substances were searched by the prospective owner. After the search, a subsequent owner would avoid liability for contamination which occurred prior

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<sup>231</sup>*Id.* at (C)(ii). An "environmental professional" is defined as "an individual, or an entity managed or controlled by such individual who, through academic training, occupational experience and reputation (such as engineers, environmental consultants and attorneys), can objectively conduct one or more aspects of a Phase I Environmental Audit." *Id.*

<sup>232</sup>*Id.*

<sup>233</sup>*Id.*

<sup>234</sup>*Id.* at (C)(ii)(I).

<sup>235</sup>*Id.* at (C)(ii)(II).

<sup>236</sup>*Id.* at (C)(ii)(III).

<sup>237</sup>*Id.* at (C)(ii)IV).

<sup>238</sup>*Id.* at (C)(ii)(V).

to ownership. Furthermore, if the Audit reveals the presence or likely presence of a release or threatened release of hazardous substances, the buyer is required to take reasonable steps consistent with current technology and engineering practice to confirm their absence in order to successfully claim the presumption.<sup>239</sup> The information must be maintained in writing by the purchaser in order to claim the presumption of being an innocent landowner.<sup>240</sup>

#### B. LaFalce: Fiduciary and Lender Liability

Legislation introduced in the last Congress by Rep. John LaFalce (D-NY), as H.R. 1450,<sup>241</sup> addressed the issue of trustee liability. The bill limited liability under CERCLA<sup>242</sup> and the Resource Conservation and Recovery Act (RCRA)<sup>243</sup> of fiduciaries, lending institutions, and others holding indicia of ownership primarily to protect a security interest.<sup>244</sup> The bill stated the

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<sup>239</sup>*Id.* at (C)(iv).

<sup>240</sup>*Id.* at (C)(iii).

<sup>241</sup>H.R. 1450, 102d Cong., 1st Sess. (1991). There were 125 co-sponsors of the bill. The bill has not been reintroduced in the 103d Session. Earlier versions of the bill were H.R. 2085, 101st Cong., (1989) and H.R. 4494, 101st Cong., 2d Sess., (1990). None of the proposed legislation advanced beyond the committee stage. See Garrou, *supra* note 3, at 138-142; McReynolds, *supra* note 4, at n. 209.

<sup>242</sup>CERCLA § 101(20).

<sup>243</sup>42 U.S.C. § 6923(a).

<sup>244</sup>H.R. 1450 §§ 1, 2.

terms "owner" or "operator" under the statutes would not include a person who holds indicia of ownership primarily to protect a security interest without participating in management.<sup>245</sup>

"Indicia of ownership" was defined as being acquired for the purpose of securing payment or performance, or protecting a security interest.<sup>246</sup> The bill defined "participating in management" as "actual, direct, and continual or recurrent exercise of managerial control by a person over the vessel or facility in which he or she holds a security interest . . . which managerial control materially divests the borrower, debtor, or obligor of such control."<sup>247</sup>

The term "primarily to protect his or her security interest" included, but was not limited to, ownership rights as a security interest holder.<sup>248</sup> It contemplated exercising rights to protect a security interest, preserve value of collateral, or recover a loan or indebtedness.<sup>249</sup> This would include a person who acquired title upon default or in lieu of foreclosure.<sup>250</sup> Actions to foreclose, sell, otherwise cause a transfer, or to assist in winding down its operations or activities, were not

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<sup>245</sup>*Id.* § 1, (E)(i). Section 1 would amend CERCLA by creating § 9601(20)(E) and (F).

<sup>246</sup>*Id.* at (E)(ii).

<sup>247</sup>*Id.* at (E)(iii).

<sup>248</sup>*Id.* at (E)(iv).

<sup>249</sup>*Id.*

<sup>250</sup>*Id.*

considered "participating in management."<sup>251</sup> However, if a person acted to cause or worsen a release or threatened release, that person would be liable for the cost attributable to the act.<sup>252</sup>

The bill would have exempted a fiduciary or trustee from being an "owner" or "operator" under CERCLA.<sup>253</sup> A fiduciary or trustee who acquired ownership or control without previous participation in the management would be exempt from liability arising due to the actions of previous owners.<sup>254</sup> Liability would have been imposed on a trustee or fiduciary "who willfully, knowingly, or recklessly causes or exacerbates a release or threatened release of a hazardous substance shall be liable for the cost of such response, to the extent that [it] . . . is attributable to the fiduciary's or trustee's activities."<sup>255</sup> The bill would not have prevented actions against the estate's assets held by the fiduciary or trustee in their representative capacities.<sup>256</sup>

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<sup>251</sup>Id. at (E)(v).

<sup>252</sup>Id. at (E)(vi).

<sup>253</sup>Id. at (F)(i).

<sup>254</sup>Id.

<sup>255</sup>Id. at (F)(ii). The proposal did not specifically address the issue of liability arising from a failure to stop a release or threatened release of a hazardous substance.

<sup>256</sup>Id. at (F)(iii).

C. Garn: Asset Conservation

Also in the 102nd Congress, Sen. Jake Garn (R-Utah), introduced S. 651,<sup>257</sup> entitled the "Asset Conservation and Deposit Insurance Protection Act of 1991."<sup>258</sup> That bill would have amended the Federal Deposit Insurance Act<sup>259</sup> to limit the liability of trustees and others acting in a fiduciary capacity. The bill would have applied to insured depository institutions and mortgage lenders when acting in a fiduciary capacity.<sup>260</sup>

The limitation on liability would have insured depository institutions against liability under any Federal law imposing strict liability for the release or threatened release of a hazardous substance from certain properties.<sup>261</sup> Liability would have been limited to the "actual benefit"<sup>262</sup> conferred on the institution by removal, remedial, or other response action undertaken by another party.<sup>263</sup> These properties included those

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<sup>257</sup>S. 651, 102d Cong., 1st Sess. (1991). The bill has not been reintroduced in the 103rd Congress. Earlier versions of the bill were S. 2319, 101st Cong., 2d Sess. (1990) and S. 2827, 101st Cong., 2d Sess. (1990) "Lender Liability Act of 1990."

<sup>258</sup>*Id.* at Subtitle B, § 151.

<sup>259</sup>12 U.S.C. 1812(c).

<sup>260</sup>S. 651 at Subtitle B, § 36(a)(1), (2).

<sup>261</sup>*Id.* at § 36(a)(1).

<sup>262</sup>*Id.* at § 36(b).

<sup>263</sup>*Id.* at § 36(a)(1)(D).



acquired through foreclosure,<sup>264</sup> held in fiduciary capacity,<sup>265</sup> held by a lessor pursuant to the terms or an extension of credit,<sup>266</sup> or those subject to financial control or oversight pursuant to the terms of and extension of credit.<sup>267</sup>

Mortgage lenders liability also would have been limited in a similar manner.<sup>268</sup> The difference is they would not have included those held in a fiduciary capacity.

The proposal also addressed the "unexercised capacity to influence."<sup>269</sup> It exempted both the insured depository institution and mortgage lender from liability, based solely on the fact that it had the unexercised capacity to influence operations at, or on, property in which it had a security interest.<sup>270</sup>

The limitation on liability would not have applied in three circumstances:<sup>271</sup> (1) if any person that caused or contributed to the release of a hazardous substance forming the basis for liability;<sup>272</sup> (2) if a person failed to take reasonable steps to

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<sup>264</sup>*Id.* at § 36(a)(1)(A).

<sup>265</sup>*Id.* at § 36(a)(1)(B).

<sup>266</sup>*Id.* at § 36(a)(1)(C).

<sup>267</sup>*Id.* at § 36(a)(1)(D).

<sup>268</sup>*Id.* at § 36(a)(2)(A), (B).

<sup>269</sup>*Id.* at § 36(a)(3).

<sup>270</sup>*Id.*

<sup>271</sup>*Id.* at § 36(c).

<sup>272</sup>*Id.* at § 36(c)(1).

prevent the continued release of a hazardous substance forming the basis for liability,<sup>273</sup> including discovery prior to, or after acquisition or termination of the lease, and the person failed to take reasonable steps to prevent the continued release of a hazardous substance forming the basis for liability;<sup>274</sup> and (3) if a person actively directed or conducted operations resulting in the release of hazardous substances forming the basis for liability.<sup>275</sup>

The bill defined "fiduciary capacity"<sup>276</sup> to include those "acting for the benefit of a nonaffiliated person as a trustee, executor, administrator, custodian, guardian of estates, receiver, conservator, committee of estates of lunatics, or any similar capacity."<sup>277</sup>

## VI. STATE LEGISLATION

Seven states have addressed the issue of potential liability of fiduciaries and trustees under environmental laws. These states are Alabama,<sup>278</sup> Indiana,<sup>279</sup> North Carolina,<sup>280</sup> Rhode

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<sup>273</sup>*Id.* at § 36(c)(2).

<sup>274</sup>*Id.*

<sup>275</sup>*Id.* at § 36(c)(3).

<sup>276</sup>*Id.* at § 36(h)(3).

<sup>277</sup>*Id.*

<sup>278</sup>ALA. CODE § 19-3-11 (1990).

Island,<sup>281</sup> Tennessee,<sup>282</sup> Utah,<sup>283</sup> and Virginia.<sup>284</sup>

The states are divided into three categories. In the first category, are North Carolina, Rhode Island, Utah and Virginia. They set forth the following enumerated discretionary powers. First, they provide for inspecting property held in a fiduciary capacity to determine compliance with environmental laws, in addition to those rights and remedies set forth by any will, trust, or other document.<sup>285</sup> Second, they permit taking any action necessary on behalf of the trust or estate to prevent or remedy any violation.<sup>286</sup> Third, they permit refusing to accept property in trust if the property is contaminated by any hazardous substance or is being used or has been used in a manner which could result in liability to the trust or impair the value

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<sup>279</sup>IND. CODE ANN. §§ 13-7-20-24, 13-7-20.1-14 (Burns Supp. 1992).

<sup>280</sup>N.C. GEN. STAT. § 32-27(8.1) (Supp. 1991).

<sup>281</sup>R.I. GEN. LAWS § 18-4-26 (1992).

<sup>282</sup>TENN. CODE ANN. § 35-50-110(32) (1991).

<sup>283</sup>UTAH CODE ANN. § 75-1-109 (Supp. 1991).

<sup>284</sup>VA. CODE ANN. § 64.1-57(t) (Supp. 1990).

<sup>285</sup>N.C. GEN. STAT. § 32-27(8.1)(a); UTAH CODE ANN. § 75-1-109(1)(a); VA. CODE ANN. § 64.1-57(t)(1); R.I. GEN. LAWS § 18-4-26(1)(a).

<sup>286</sup>N.C. GEN. STAT. § 32-27(8.1)(b); UTAH CODE ANN. § 75-1-109(1)(b); VA. CODE ANN. § 64.1-57(t)(2); R.I. GEN. LAWS § 18-4-26(1)(b).

of the assets.<sup>287</sup> Fourth, they permit settlement and compromise at any time and all claims against the trust or estate which may be asserted by any governmental body or private party involving the alleged violation of any environmental law affecting the property held in trust or in an estate.<sup>288</sup> Fifth, they disclaim any power granted by any document, statute, or rule of law which may cause the fiduciary to incur personal liability under any environmental law.<sup>289</sup> Sixth, they permit the fiduciary to decline to serve or resign because of a conflict of interest between the fiduciary in its or his fiduciary capacity and its individual capacity, because of potential claims or liabilities which may be asserted against the fiduciary.<sup>290</sup> Seventh, the fiduciary is entitled to charge the cost of any inspection, review, abatement, response, cleanup, or remedial action

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<sup>287</sup>N.C. GEN. STAT. § 32-27(8.1)(C); UTAH CODE ANN. § 75-1-109(1)(c); VA. CODE ANN. § 64-1-57(t)(2); R.I. GEN. LAWS § 18-4-26(1)(c).

<sup>288</sup>N.C. GEN. STAT. § 32-27(8.1)(d); UTAH CODE ANN. § 75-1-109(1)(d); R.I. GEN. LAWS § 18-4-26(1)(d); the Virginia statute does not contain this provision.

<sup>289</sup>N.C. GEN. STAT. § 32-27(8.1)(e); UTAH CODE ANN. § 75-1-109(1)(e); VA. CODE ANN. § 64.1-57(t)(4); R.I. GEN. LAWS § 18-4-26(1)(e).

<sup>290</sup>N.C. GEN. STAT. § 32-27(8.1)(f); UTAH CODE ANN. § 75-1-109(1)(f); VA. CODE ANN. § 64.1-57(u) (not permitting the power to decline to serve, but permits a fiduciary already appointed to resign because of potential environmental liability of the trust or estate assets); Rhode Island does not have this provision in its statute.

authorized against the income or principal of the trust estate.<sup>291</sup>

Included in the second category are Alabama and Tennessee. They contain the seven previous provisions in their statutes,<sup>292</sup> and also state that a fiduciary in its individual capacity shall not be considered an owner or operator of any property of the trust or estate for purposes of any environmental law.<sup>293</sup>

Indiana is in a third category. Its has two statutes that limit the liability of creditors and fiduciaries, respectively, as to petroleum facilities<sup>294</sup> and underground storage tanks.<sup>295</sup> Essentially, creditors and fiduciaries are not liable unless they have exercised actual and direct managerial control of the petroleum facility or underground storage tank.<sup>296</sup>

## VII. THE INDUSTRI-PLEX SITE CASE STUDY

As a result of the consent decree in Stauffer, the Industri-Plex became the first, and is to date the only custodial trust,

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<sup>291</sup>N.C. GEN. STAT. § 32-27(8.1)(g); UTAH CODE ANN. § 75-1-109(1)(3); VA. CODE ANN. § 64.1-57(t)(5); R.I. GEN. LAWS § 18-4-26(1)(g).

<sup>292</sup>ALA. CODE § 19-3-11(a)(1)-(6), (a); TENN. CODE ANN. § 35-50-110(32)(A)(i)-(B)(i).

<sup>293</sup>ALA. CODE § 19-3-11(d); TENN. CODE ANN. § 35-50-110(32)(B)(ii).

<sup>294</sup>IND. CODE ANN. § 13-7-20.1-14.

<sup>295</sup>IND. CODE ANN. § 13-7-20-24.

<sup>296</sup>IND. CODE ANN. §§ 13-7-20-24(b)(1), 13-7-20.1-14(c).

used at a Superfund site in the United States.<sup>297</sup> While the possibility of trustee liability remains, as is apparent in the foregoing analysis, this Industri-Plex is instructive because it uses a trust in a manner to make it part of the legal solution to the problem of the contaminated site. In addition, it not only incorporates remediation through the Remedial Trust, but plans for two contingencies: (1) sale via the Interim Custodial Trust, or (2) the management of the property through a Long-Term Custodial Trust, if the land cannot be remediated to facilitate sale of the property.<sup>298</sup> It plans to achieve the important step of returning the land to productive use as part of an infrastructure/public transportation development to benefit the community and Commonwealth of Massachusetts.<sup>299</sup> Thus, the plan fulfills the statutory goal of CERCLA of providing a permanent solution to the maximum extent possible.<sup>300</sup>

This case study will begin with an overview of the background of the Site, including the industrial history, proposed remedy, and plans for infrastructure/public transportation development. Next, it will explain the interrelationship among the Consent Decree, Remedial Trust, Interim Custodial Trust, and Long Term Custodial Trust to

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<sup>297</sup>*Supra* note 6 [hereinafter Site].

<sup>298</sup>*Industri-Plex Site Fact Sheet, Industri-Plex Site Remedial Trust 1* (Jan. 5, 1993) (on file with author).

<sup>299</sup>*Id.*

<sup>300</sup>CERCLA § 121(b)(1).

demonstrate how they work in unison. Finally, it will analyze the respective provisions of the four documents. This will serve two purposes: (1) to demonstrate how the provisions of the custodial trust are incorporated; and (2) to demonstrate how they address the issue of trustee liability. From this analysis, the practitioner will be able to obtain a working knowledge of a legal mechanism that provides a solution to an expensive and time-consuming environmental problem.

#### A. Background of the Site

##### 1. The Industri-Plex Site

The Site is a 245-acre industrial park located in Woburn, Massachusetts.<sup>301</sup> From the mid-1800s until 1969, the Site was used to manufacture chemicals, leather, textiles, and paper products.<sup>302</sup> Later, the Site was designated as a Superfund site

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<sup>301</sup>*Industri-Plex Site Fact Sheet, supra note 298, at 1.*

<sup>302</sup>*Industri-Plex Site Chronology, Industri-Plex Site Remedial Trust (Jan. 5, 1993) (on file with author). The Industrial History is as follows:*

Date	Owner/Operator	Use
Pre-1853	Unknown	Undeveloped land
1853-63	Woburn Chemical Works	Manufactured chemicals, especially for textile, leather and paper industries. Wastes: solid wastes disposed of in pits; liquid wastes in streams and sewers.

by the EPA.<sup>303</sup>

1863-	Merrimac Chemical Co.	Manufactured many types of acids, pesticides (during war, munitions), resulting in inorganic wastes left on the site.
1929-31	Monsanto Chemical Co.	Similar products and wastes to Merrimac.
1931-34	F & L Land Salvage & Improvement Co.	Salvaged existing plant equipment.
1934-36	New England Chemicals Industries, Inc.	Manufacture of animal hide glues and gelatin.
1936-61	Consolidated Chemicals Industries	Same as New England Chemical.
1961	Stauffer Chemical Co.	Same as prior owner.
1968	Mark-Phillip Trust*	Industrial park. Created 4 piles of hide wastes remaining after glue manufacturing process (the glue-making process actually consumed many hide fragments and other wastes). Moving hide wastes released "Woburn odor" (hydrogen sulfide) from decomposing hide wastes.

\*The Mark-Phillip Trust is one of the successive owners of the property, and is separate and distinct from the Interim Custodial, Long-Term Custodial, and Remedial Trusts. *Id.* at 1.

<sup>303</sup>*Industri-Plex Site Fact Sheet, supra* note 298, at 1.  
The Chronology of events continues as follows:

1970s--construction activity for the industrial park uncovered the industrial by-products and wastes that had accumulated on the site; the exposure and movement of decaying hides buried during past site activities causes the release of noxious odors; many of the chemical and hide wastes in the soil were relocated and mixed into piles near and in wetland areas on the property;

1975--citizens complained to state agencies about odors; notices of violation were issued by Department of Environmental Quality Engineering (current DEP) to Mark-Phillip Trust for construction



## 2. Nature of Pollution

The nature of the pollution included animal hides and residues which were used to manufacture glue and were buried on

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without permit;

1977--lawsuits by the Town of Reading and Massachusetts Attorney General resulted in a court order prohibiting the Mark-Phillip Trust from excavating two untouched parcels thought to contain most of the remaining glue wastes;

1979--U.S. Army Corps of Engineers stopped further development on site for wetlands preservation;

1980--DEP sprayed latex cover over part of the site where inorganic wastes were found;

1982--EPA added Industri-Plex Site to its list of priority hazardous waste sites that are eligible to receive federal funding for investigation and clean up; study conducted on nature and extent of contamination of the site;

1985--Remedial Investigation/ Feasibility Study completed, analyzing nature and extent of contamination and outlining alternatives for remediation;

1986--EPA issued Record of Decision (ROD), which outlined remedial alternatives and EPA's preferred remedy for the site;

1989--consent decree issued by EPA which included outcome of negotiations with past and present site owners to determine cost-sharing remediation;

1990--EPA approved site Pre-Design Investigation, outlining information Industri-Plex Site Remedial Trust had to collect to proceed with design or remediation process; additional testing carried out; city rezoned the site from office to industrial use;

1991--final plans for remediation filed with EPA and DEP; state and city made commitment to proceed with I-93 interchange;

1992--EPA and DEP approved soil remedy; physical work on remediation process began; state made commitment to build regional transportation center. *Chronology, supra* note 302 at 2.

the premises.<sup>304</sup> These became concentrated in the areas known as the East, South, West, and East-Central Hide Piles and emitted noxious odors.<sup>305</sup> The soil was contaminated with heavy metals, including chromium, lead and arsenic.<sup>306</sup> In addition, toluene and benzene contaminated the groundwater.<sup>307</sup>

### 3. Make-up of the Site

The Site is open land, streams and ponds.<sup>308</sup> It also includes utility right-of-ways, roads, railroads, and some operating commercial businesses. Sixty acres are used by commercial businesses; the remaining 185 are acres undeveloped.<sup>309</sup> The anticipated future use is to have 110 acres in commercial use, 35 acres in infrastructure/local transportation, and 100 acres as wetlands and open land.<sup>310</sup>

### 4. Site Remedy

The remedies include treatment of the soil, hide piles,

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<sup>304</sup>*Id.*

<sup>305</sup>*Id.*

<sup>306</sup>*Id.*

<sup>307</sup>*Id.*

<sup>308</sup>*Id.*

<sup>309</sup>*Id.*

<sup>310</sup>*Id.*

wetlands, and groundwater.<sup>311</sup> Soil containing high concentrations of heavy metals will be capped to prevent physical contact with contaminants, using clean soil and a geotextile layer.<sup>312</sup> The West, South and East-Central Hide Piles remedy will enable liquids and gases to flow through a permeable soil cap.<sup>313</sup> The East Hide Pile, as the only active odor source on the Site, will also be covered.<sup>314</sup> It will consist of a cap of soil over a drainage layer, a layer of impermeable synthetic membrane, and gravel.<sup>315</sup> This will provide a barrier and restrict the flow-through of liquids and gases.<sup>316</sup> Underneath

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<sup>311</sup>*Id.* at 2. The timetable is as follows:

1992--covering portions of the site with geotextile layer, soil, and vegetation;

1993--continuation of soil cover/wetlands/hide pile remedy construction; approved design and construction initiation of groundwater remedy; design of Institutional Controls (to regulate future use); development I-93 Regional Transportation Center and Commerce Way Extension;

1994--completion of soil cover/wetlands/hide pile remedy; completion of groundwater remedy; design completion and initiation of Institutional Controls to protect remedy during development and use;

1995--the companies that are part of the Remedial Trust are obligated to operate and maintain the remedial facilities for 30 years. *Id.*

<sup>312</sup>*Id.*

<sup>313</sup>*Id.*

<sup>314</sup>*Id.*

<sup>315</sup>*Id.*

<sup>316</sup>*Id.*

the impermeable layer a gas collection system will be built to collect and treat hydrogen sulfide gas and other gases produced by decomposition of organic hide wastes.<sup>317</sup>

Wetlands sediments on the Site will be developed and covered with clean soil to restore wetland habitat.<sup>318</sup> Those wetlands lost as a result of the engineering design of the East Hide Pile will be replaced by the creation of a new wetland area about 4 acres in size.<sup>319</sup>

An interim remedy for the groundwater contamination will treat the hot spot areas to remove benzene and toluene.<sup>320</sup> Several wells will be installed to monitor the effectiveness of the groundwater remedy.<sup>321</sup> The groundwater/surface water investigation is expected to result in a permanent remedy to resolve all groundwater problems at the Site.<sup>322</sup> It will also address the removal of metals and organics in the groundwater.<sup>323</sup>

## 5. Infrastructure/Public Transportation Development

The trusts play a pivotal role in the remediation and reuse

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<sup>317</sup>*Id.*

<sup>318</sup>*Id.*

<sup>319</sup>*Id.*

<sup>320</sup>*Id.*

<sup>321</sup>*Id.*

<sup>322</sup>*Id.*

<sup>323</sup>*Id.*

of the property. Remediation and final use are intertwined because, if remediated, the property can be sold, or in the event the land cannot be remediated, there must be a long-term management plan.<sup>324</sup>

Infrastructure developments planned for the Site are an interstate highway interchange project (I-95), a regional transportation center, and extension of a highway to provide currently nonexistent access to north Woburn.<sup>325</sup> The interchange is one of the highest priority projects by the Massachusetts Highway Department (MHD), and includes funding of \$10 million in the state and federal highway budget.<sup>326</sup> In addition, the interchange has been designated a "fast track" project and is scheduled to begin in late 1994 or early 1995.<sup>327</sup> Construction is scheduled for two years.<sup>328</sup> The 5 percent of the funding not covered by the state and federal monies will come from the City of Woburn and the private sector.<sup>329</sup> All permitting will be funded by the Woburn Redevelopment Authority.<sup>330</sup>

In addition, the Site will also include a Regional

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<sup>324</sup>*Supra* note 298.

<sup>325</sup>INDUSTRI-PLEX SITE REMEDIAL TRUST, LAYING THE GROUNDWORK FOR GROWTH 7 (1992).

<sup>326</sup>*Id.*

<sup>327</sup>*Id.*

<sup>328</sup>*Id.*

<sup>329</sup>*Id.*

<sup>330</sup>*Id.*

Transportation Center, funded by the Commonwealth.<sup>331</sup> It will be able to provide a variety of services, including a 2,500-car park-and-ride for commuter rail, airport, shuttlebus, and potential helicopter services.<sup>332</sup> It will meet transportation needs and relieve traffic congestion in the region.<sup>333</sup>

B. Interrelationship among the Consent Decree,  
Remedial Trust, and Custodial Trusts

In 1989 the Consent Decree was signed for remediation of the Site.<sup>334</sup> Under that settlement, the Industri-Plex Site Remedial Trust and the Industri-Plex Site Interim Custodial Trust were established.<sup>335</sup> The EPA and Massachusetts Department of Environmental Protection (DEP) oversee site activities, to ensure work conducted by the Remedial Trust and contractors meet the standards and the guidelines contained in the consent decree.<sup>336</sup>

The Remedial Trust represents the parties potentially responsible for the contamination at the site.<sup>337</sup> Included are

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<sup>331</sup>*Id.*

<sup>332</sup>*Id.*

<sup>333</sup>*Id.* at 8.

<sup>334</sup>Consent Decree, § III.W. See also *Fact Sheet*, *supra* note 298, at 1.

<sup>335</sup>*Id.* §§ VIII.B, IX.A.

<sup>336</sup>*Id.* at VII.F.

<sup>337</sup>*Id.* at app. III. See also *Fact Sheet*, *supra* note 298, at 1.

approximately 22 current and former owners of the land.<sup>338</sup> It was formed to pay for and conduct the site cleanup.<sup>339</sup>

The purpose of the Interim Custodial Trust is to hold, manage and sell a 117-acre parcel owned by a financially insolvent property owner.<sup>340</sup> When the property is sold, the proceeds will include distribution to the City of Woburn, the EPA and DEP, and members of the Remedial Trust as beneficiaries.<sup>341</sup>

The Long-Term Custodial Trust<sup>342</sup> is created to receive, hold and manage property which cannot be sold through the provisions of the Interim Custodial Trust.<sup>343</sup> Thus, it provides for long-term management of the property.

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<sup>338</sup>*Id.* at 1. The donors include: Stauffer Chemical Company; Stauffer Management Company; ICI American Holdings, Inc.; Monsanto Company; Atlantic Avenue Associates, Inc.; Boston Edison Company; Boyd Corporation, Stephen Dagata and Adeline Dagata; Mary E. Fitzgerald and John J. Mulkerin, as trustees of the Nodraer Realty Trust; Hiro K. Ganglani and Sunder K. Ganglani; Michael A. Howland individually and as trustee of Atlantic Avenue Trust; Lipton Industries, Inc.; Ronald F. Liss; Massachusetts Bay Transportation Authority; Richard G. Mizzone, Metrophane Zayka Jr., Nicholas Zayka and Peter Zayka, as trustees of the Aero Realty Trust; Paul X. O'Neill and Phyllis O'Neill, as trustees of the PX Realty Trust; Pebco Company; Positive Start Realty, Inc.; Augustine P. Sheehy; Peter J. Volpe; the Welles Company; Winter Hill Storehouse, Inc.; City of Woburn; and Woodcraft Supply Corporation. *Id.*

<sup>339</sup>*Id.* at art. I, § 1.01.

<sup>340</sup>*Id.* at app. IV, art. II, § 2.02. See also *Fact Sheet*, *supra* note 302, at 1.

<sup>341</sup>*Id.* at app. V.

<sup>342</sup>*Id.* at app. IV, ex. 1, art. II, § 2.02.

<sup>343</sup>*Id.* at app. IV, art. II, § 2.02.

## C. Consent Decree

### 1. Custodial Trust Provisions

The Consent Decree begins by defining the Custodial Trust as a trust established "for the purposes of, among other things, receiving, holding, and realizing value from real property and other assets conveyed by the Mark-Phillip Trust."<sup>344</sup> In addition, it has all the responsibilities and obligations under federal and Massachusetts law of a private, non-charitable landowner.<sup>345</sup>

The Custodial Trust was created within 15 days of the entry of the Consent Decree by the Settlers (other than the Mark-Phillip Trust).<sup>346</sup> Within two days of the entry of the Consent Decree the Settlers submitted the Custodial Trust to the EPA and the Commonwealth for approval.<sup>347</sup> The Consent Decree also permitted the amendment of the Custodial Trust by the Settlers by submitting any proposed changes at least 10 days before the effective date, for approval by the EPA and Commonwealth, to become enforceable under the Consent Decree.<sup>348</sup> Within the later date of 5 days after the establishment of the Custodial Trust or

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<sup>344</sup>Consent Decree, § III.C. See *supra* note 302.

<sup>345</sup>*Id.* at IV.C.

<sup>346</sup>*Id.* at IX.A.

<sup>347</sup>*Id.* at IX.

<sup>348</sup>*Id.*



15 days after entry of the Decree, the Mark-Phillip Trust conveyed all its property to the Custodial Trust.<sup>349</sup>

The general obligations of the Custodial Trust concerning the Mark-Phillip Trust are several.<sup>350</sup> These include: receiving, holding managing and maintaining it until sold; inaugurating and complying with any Institutional Controls; providing access to property for the required work site; subdividing, locating purchasers, and negotiating terms of sale of property; and paying proceeds of sales to the Escrow Account.<sup>351</sup>

Generally, the sale or conveyance of property by the Custodial Trust can occur only after the Certification of Completion of Remedial Action.<sup>352</sup> There are two exceptions to this provision.<sup>353</sup> First, if the EPA and Commonwealth determine, as to a given parcel, that all Remedial Action work on site has been completed and institutional controls are in place.<sup>354</sup>

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<sup>349</sup>*Id.* at IX.B.

<sup>350</sup>*Id.*

<sup>351</sup>*Id.*

<sup>352</sup>*Id.* at IX.D.

<sup>353</sup>*Id.* "Remedial Action" is defined as the work required by the Consent Decree, including the Remedial Design/Action Plan, with the exception of Long-Term Operation and Maintenance. *Id.* at III.W. "Institutional Controls" mean the land use restrictions and other regulations and controls designed to maintain the integrity and prevent the unauthorized disturbance of the caps and other structures that will be constructed at the Site. *Id.* at III.L.

<sup>354</sup>*Id.* at IX.D.

Second, if the EPA and Commonwealth otherwise agree to sale upon terms and conditions, to assure the performance of all Remedial Action on it and implementation of Institutional Controls.<sup>355</sup> Furthermore, the Custodial Trust is not permitted to assign interests in the property without advance approval of the United States in consultation with the Commonwealth.<sup>356</sup>

With respect to Institutional Controls generally, they are considered to run with the land and bind Settlers and all Successors-in-Title, including the Custodial Trust.<sup>357</sup> The Landowner/Successor is required to inaugurate and comply with all Institutional Controls.<sup>358</sup> Until they are completed or a determination is made that they are not required, no Settler/Successor may sell any possessory interest in the Site without approval of the EPA and Commonwealth.<sup>359</sup> In addition, no Settler/Successor-in-Title may cause or permit disturbance of mechanisms implemented, except as permitted by the approved Institutional Controls.<sup>360</sup> The EPA and Commonwealth agree to provide to any proposed Successor-in-Title within 30 days a written statement of current owner's compliance with

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<sup>355</sup>*Id.*

<sup>356</sup>*Id.*

<sup>357</sup>*Id.* at X.A.

<sup>358</sup>*Id.*

<sup>359</sup>*Id.*

<sup>360</sup>*Id.*

Institutional Controls.<sup>361</sup> Within 10 days of entry of the Consent Decree, each Landowner/Settler and the Mark-Phillip Trust is required to record a notice of Institutional Controls with the Registry of Deeds.<sup>362</sup> Finally, the provisions of the Institutional Control section apply to the Custodial Trust with respect to all Mark-Phillip Trust real property at the Site, with equal force and effect as if the Custodial Trust were a Settler.<sup>363</sup>

The realization of any net proceeds realized from sale of the property shall be paid by the Custodial Trust to the Escrow Account.<sup>364</sup> The net value is computed at sale by deducting from the proceeds for payment by the Custodial Trust to the City of Woburn the sums of 10 percent of the first \$3 million of net proceeds plus 10 percent of the excess of \$10 million, until \$645,000 is reached.<sup>365</sup> In addition, the Custodial Trust also has specific obligations regarding unsalable property.<sup>366</sup> If the EPA and Commonwealth and Settlers agree that any Mark-Phillip Trust property is unsalable, the Custodial Trust shall establish

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<sup>361</sup>*Id.*

<sup>362</sup>*Id.* at X.B.

<sup>363</sup>*Id.* at X.C.

<sup>364</sup>*Id.* at IX.D. The parties agreed the costs deducted from the sale of Mark-Phillip Trust Property in determining net value included amounts paid by the Custodial Trust to the City of Woburn for real estate taxes accrued prior to entry of the Consent Decree. *Id.*

<sup>365</sup>*Id.*

<sup>366</sup>*Id.* at IX.C

and fund a Long-Term Trust.<sup>367</sup>

Finally, the Consent Decree terminates upon completion of the work, as certified by EPA in consultation with the Commonwealth, or determined by the Court.<sup>368</sup> The exceptions to termination are that the following requirements remain in full force and effect until otherwise agreed by the Parties and approved by the court: the Custodial Trust;<sup>369</sup> Institutional Controls;<sup>370</sup> Settlers's Coordinator;<sup>371</sup> annual reports;<sup>372</sup> access;<sup>373</sup> dispute resolution;<sup>374</sup> stipulated penalties;<sup>375</sup> retention and delivery of records;<sup>376</sup> and notices.<sup>377</sup> In addition, termination will not affect the Covenants Not to Sue.<sup>378</sup>

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<sup>367</sup>*Id.*

<sup>368</sup>*Id.* at XXIX.B.

<sup>369</sup>*Id.* at IX.A, C.

<sup>370</sup>*Id.* at X.A, C, D.

<sup>371</sup>*Id.* at XI.

<sup>372</sup>*Id.* at XII.D.

<sup>373</sup>*Id.* at XV.A, B.

<sup>374</sup>*Id.* at XII.

<sup>375</sup>*Id.* at XXIII.C-G.

<sup>376</sup>*Id.* at XXVII.

<sup>377</sup>*Id.* at XXVIII.

<sup>378</sup>*Id.* at XXIV, XXV.

## 2. Trustee Liability

The Consent Decree contains three provisions that address trustee liability. The first is a provision entitled Responsibility and Limitation on Liability.<sup>379</sup> It requires Settlers, other than the Mark-Phillip Trust, to be jointly and severally liable for any failure by the Custodial Trust or any further trust (as well as any failure by the escrowee of the Escrow), to comply with the Consent Decree.<sup>380</sup> Furthermore, noncompliance is imputed to the Settlers rather than the Custodial Trust or the escrowee of the Escrow.<sup>381</sup> In addition, the United States and Commonwealth agree that the Settlers, Custodial Trust, and the Trustees of the Custodial Trust will not be considered owners or operators of any of the property at the Site, solely by the ownership and disposition of the property by the Trust, in accordance with the Consent Decree.<sup>382</sup> That is subject to the condition that they do not conduct or permit others to perform any activities other than those specified in the Consent Decree.<sup>383</sup>

Second, the provisions in the Covenants Not to Sue contains reservations by the United States and the Commonwealth against

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<sup>379</sup>*Id.* at IX.F.

<sup>380</sup>*Id.*

<sup>381</sup>*Id.*

<sup>382</sup>*Id.*

<sup>383</sup>*Id.*

Settlers with respect to all other matters.<sup>384</sup> Included as reservations are: (1) claims based on a failure by any Settler to meet a requirement of the Consent Decree; (2) claims based on the failure of any Settler who is a Landowner, or Successor-in-Interest (including the Custodial Trust), to comply with Institutional Controls or Access; (3) liability arising from the past, present or future disposal, release or threat of release of Hazardous Substances outside of and not attributable to the Site; (4) liability for the disposal of any Hazardous Substances taken from the Site; (5) liability for groundwater contamination or for soil contamination that causes or contributes to groundwater contamination; or (6) liability for damages for injury to, destruction or, or loss of natural resources.<sup>385</sup> Finally, each Settler covenants not to sue, or to maintain or assert any claim against another Settler.<sup>386</sup> The Covenants Not to Sue, however, do not apply to claims to enforce the terms of the Consent Decree, Remedial Trust Agreement, or Custodial Trust Agreement.<sup>387</sup>

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<sup>384</sup>*Id.* at XXIV.A.

<sup>385</sup>*Id.*

<sup>386</sup>*Id.* at XXV.C.

<sup>387</sup>*Id.*

## D. Remedial Trust

### 1. Custodial Trust Provisions

The Remedial Trust contains two provisions that pertain to the Custodial Trust. The first provision is Payment of Expenses and Loans to Industri-Plex Site Interim Custodial Trust.<sup>388</sup> It provides for the payment by the Remedial Trustee, subject to the approval of the Management Committee,<sup>389</sup> of the invoices of the Interim Custodial Trustee for expenses incurred pursuant to the Consent Decree.<sup>390</sup> Also included are provisions for interest-free loans to the Interim Custodial Trustee for arranging sale of the real estate.<sup>391</sup> Payments and loans are based upon estimates of the costs of operation of the Interim Custodial Trust for the following 120 days, with estimates prepared as part of the expenditure forecasts by the Project Team.<sup>392</sup> However, it permits the Interim Custodial Trustee to submit a request and invoice to the Remedial Trustee for up to \$50,000 of Initial

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<sup>388</sup>*Id.* at app. III, art. V, § 5.03.

<sup>389</sup>*Id.* at app. III, art. III, § 3.01. The Management Committee represents the donors in day-to-day transactions. It is comprised of one representative each from Monsanto and ICI, and one selected collectively by the other donors. *Id.*

<sup>390</sup>*Id.* at app. III, art. V, § 5.03.

<sup>391</sup>*Id.*

<sup>392</sup>*Id.*

Operating Funding.<sup>393</sup> This may be done at any time following the Interim Custodial Trustee's acceptance of the Interim Custodial Trust without an estimate of the cost of operations for the following 120 days.<sup>394</sup> Furthermore, the Interim Custodial Trustee may submit a request and invoice to the Remedial Trustee at any time for additional funds.<sup>395</sup> The request need only be accompanied by a statement stating why the Interim Custodial Trustee needs additional funding to carry out its duties and why the regular funding would not likely result in timely receipt of the required funding.<sup>396</sup> After approval by the Management Committee, payments are made within 30 days after receipt of approval.<sup>397</sup> If funds are available, the loans and payments shall be made as soon as possible.<sup>398</sup> Contributions for loans and payments are paid by the Donors.<sup>399</sup> Their failure to make a payment is considered a default<sup>400</sup> and delinquency is subject to interest.<sup>401</sup>

The second provision of the Remedial Trust which

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<sup>393</sup>*Id.*

<sup>394</sup>*Id.*

<sup>395</sup>*Id.*

<sup>396</sup>*Id.*

<sup>397</sup>*Id.*

<sup>398</sup>*Id.*

<sup>399</sup>*Id.* at § 2.02.

<sup>400</sup>*Id.* at § 2.03.

<sup>401</sup>*Id.* at § 2.04.



interrelates with the Custodial Trust is Payment to the Industrial Site Long-Term Custodial Trust.<sup>402</sup> It permits the Remedial Trustee, subject to the approval of the Management Committee, to pay to the Long-Term Custodial Trustee the amount determined by the Interim Custodial Trustee to be necessary for the custodial care of any property to be held by the Long-Term Custodial Trust.<sup>403</sup> The amount must be approved by the EPA and the Commonwealth and may include, but is not limited to, trustee's fees, insurance, maintenance and security.<sup>404</sup> After approval by the Management Committee, payment is required within 30 days after receipt of approval by the Remedial Trustee.<sup>405</sup> As in the previous section, Contributions for payment shall be allocated among the Donors.<sup>406</sup> Their failure to make a payment of contribution is also considered a default and delinquency is subject to interest.<sup>407</sup>

## 2. Trustee Liability

Two provisions in the Remedial Trust address liability of the Remedial Trustee. The first provision is Limitation of

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<sup>402</sup>*Id.* at app. III, art. V, § 5.04.

<sup>403</sup>*Id.*

<sup>404</sup>*Id.*

<sup>405</sup>*Id.*

<sup>406</sup>*Id.*

<sup>407</sup>*Id.*

Liability.<sup>408</sup> It states that the Trustee shall only be liable for gross negligence or willful misconduct in relation to its duties under the Agreement.<sup>409</sup> The only responsibilities of the Trustee are: to hold, administer, deposit, secure, invest and use the Trust Funds as required by the Agreement; comply with the Agreement; follow the Donors' and Management Committee's directions not conflicting with the Agreement; and other express covenants and agreements made by the Trustee.<sup>410</sup>

The second provision concerning liability of the Remedial Trustee is Limitation on Financial Liability.<sup>411</sup> It provides that the Agreement shall not require the Trustee to expend or risk its own funds or otherwise incur any financial liability in the performance of any of its duties if it believes that repayment or indemnity is not reasonably assured.<sup>412</sup> Furthermore, it is not to take any action which may reasonably conflict with any rule of law, or with the terms of the Agreement.<sup>413</sup> Those actions performed by the trustee shall be consistent with the direction of the Agreement, and not impose any additional duties or responsibilities upon the Trustee.<sup>414</sup>

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<sup>408</sup>Id. at app. III, art. VIII, § 8.02.

<sup>409</sup>Id.

<sup>410</sup>Id.

<sup>411</sup>Id. at § 8.06.

<sup>412</sup>Id.

<sup>413</sup>Id.

<sup>414</sup>Id.

## E. Interim Custodial Trust

### 1. Overview

The Interim Custodial Trust is established by 22 Declarants pursuant to the Consent Decree in *Stauffer*.<sup>415</sup> It made Resource for Responsible Site Management, Inc. (RRSM) the Trustee.<sup>416</sup>

As stated previously, the Trust Purpose is to hold and manage property transferred to it and to arrange for sale of as much of the real estate as may be salable.<sup>417</sup> Then the proceeds of the sales are distributed in accordance with the provisions of the Trust.<sup>418</sup> It is not the purpose of the Trust to carry on a business.<sup>419</sup>

The duties of the Trustee with respect to the Mark-Phillip Trust Property<sup>420</sup> include the right to: (a) receive and hold title to the real estate; (b) sell all salable parcels of property; (c) distribute proceeds of sale of any parcel of property; (d) inaugurate and comply with the Institutional

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<sup>415</sup>*Supra* note 6, at app. IV.

<sup>416</sup>*Id.* RRSM is a Boston firm devoted to work on management ethics and improving public-private sector collaboration on controversial environmental and health safety issues. *Superfund Working Papers*, Clean Sites 83 (Feb. 1992) (on file with author).

<sup>417</sup>*Id.* at art. II, § 2.02.

<sup>418</sup>*Id.*

<sup>419</sup>*Id.*

<sup>420</sup>*Id.* at art. III.

Controls; (e) provide access to the property; (f) employ all reasonable measures to prevent unauthorized entry on the real property; (g) adequately insure the real property against loss due to casualty or third party liability; (h) only permit authorized work or activity on the property as permitted in the Consent Decree; and (i) comply with all relevant sections of the Consent Decree, subject to a right of compelled compliance by Settlers other than the Mark-Phillip Trust.<sup>421</sup> With regard to Sale of the Mark-Phillip Trust Property, the Trustee is authorized to sell all salable portions of the Property.<sup>422</sup> This authority is specifically given to sell to a single buyer, even if sale in parcels would generate more revenue.<sup>423</sup> The salable portions must be sold not later than four years from the date of certification of the completion of Work, unless a longer time is agreed to by Monsanto and ICI.<sup>424</sup> In addition, both are required to approve in writing the sale of the property, a right not granted to any of the other Declarants.<sup>425</sup> Finally, the Trustee is required to manage the Long-Term Custodial Fund.<sup>426</sup> If any portion of the property is deemed unsalable, the Trustee is to provide for the custodial care of the unsalable property after

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<sup>421</sup>*Id.* at § 3.01.

<sup>422</sup>*Id.* at § 3.03.

<sup>423</sup>*Id.*

<sup>424</sup>*Id.*

<sup>425</sup>*Id.*

<sup>426</sup>*Id.* at § 3.05.

all salable portions are sold.<sup>427</sup> A proposed statement of amount is to be provided to the Remedial Trustee, EPA, and the Commonwealth, but ultimate authority resides with the Custodial Trustee to establish an appropriate level of funding.<sup>428</sup>

The Trustee also has specific duties concerning the Distribution of Trust Property and Termination of the Trust.<sup>429</sup> First, it addresses Unsalable Property.<sup>430</sup> If the Trustee determines any portions are not salable, a submission is required to the Remedial Trustee, EPA, and the Commonwealth a report containing reasons for supporting that conclusion.<sup>431</sup> The EPA or Commonwealth may disagree with that determination and require the Trustee to make further efforts at sale.<sup>432</sup> Only after agreement among the EPA, Commonwealth, and the Trustee that all reasonable efforts have been made to sell the property, may it be termed unsalable.<sup>433</sup> Once that is done, the Trustee may establish a Long-Term Custodial Trust and distribute the property to it for management by the Long-Term Custodial Trustee.<sup>434</sup> Second, it provides for Proceeds of Sale of Mark-Phillip Trust

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<sup>427</sup>*Id.*

<sup>428</sup>*Id.*

<sup>429</sup>*Id.* at art. IV.

<sup>430</sup>*Id.* at § 4.01

<sup>431</sup>*Id.*

<sup>432</sup>*Id.*

<sup>433</sup>*Id.*

<sup>434</sup>*Id.*

Property.<sup>435</sup> Net proceeds from the sale of each portion of the Property are distributed in the amounts of 10 percent of the first \$3 million and the proceeds in excess of \$10 million, up to a total of \$645,000, to the City of Woburn.<sup>436</sup> The outstanding balance of advances to the Trust from the Remedial Trust are they repaid.<sup>437</sup> Any balance of proceeds is then distributed in accordance with the Escrow Agreement to the Escrow Agent.<sup>438</sup> Final distribution and termination of the trust takes place after sale and distribution of all the property, culminating in distribution pursuant to the Escrow Agreement.<sup>439</sup>

Finally, the Trustee's powers include the general powers of the office of fiduciary and the following specific powers.<sup>440</sup> First, its specific powers include retention of property to hold and retain it in the form received.<sup>441</sup> Second, the powers call for preservation of principal of the trust assets, and to maximize principle and income derived from the principal.<sup>442</sup> Third, the powers permit investment of the trust fund.<sup>443</sup> This

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<sup>435</sup>*Id.* at § 4.02.

<sup>436</sup>*Id.*

<sup>437</sup>*Id.*

<sup>438</sup>*Id.*

<sup>439</sup>*Id.* at § 4.03.

<sup>440</sup>*Id.* at art. VI.

<sup>441</sup>*Id.* at § 6.02.

<sup>442</sup>*Id.* at § 6.03.

<sup>443</sup>*Id.* at § 6.04.

authority extends to invest and reinvest all or any part of the trust property, with the exception of the Mark-Phillip Trust Property.<sup>444</sup> Fourth, the powers permit management of the custodial trust fund, to include public or private sale without prior application or approval by or order of any court, as is consistent with the provisions of the Trust and Consent Decree.<sup>445</sup> Finally, the powers also set forth those regarding real estate.<sup>446</sup> Specifically, the powers regarding real estate contemplate the ability to: (a) grant options and make other contracts concerning real estate; (b) subdivide the real estate and dedicate streets or other ways for public use with or without compensation; (c) impose easements or other restriction, and donate the unsalable real estate to charitable or public uses; (d) execute and deliver all appropriate instruments and discharge mortgages of record; and (e) record in the appropriate Registry of Deeds any instrument.<sup>447</sup>

## 2. Trustee Liability

As in the Remedial Trust, the Interim Custodial Trust addresses Limitation of Liability.<sup>448</sup> It states that the Trustee

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<sup>444</sup>*Id.*

<sup>445</sup>*Id.* at § 6.05.

<sup>446</sup>*Id.* at § 6.09.

<sup>447</sup>*Id.*

<sup>448</sup>*Id.* at app. IV, art. VIII, § 8.01.

shall only be liable to the beneficiaries for negligence, gross negligence, bad faith, or willful misconduct.<sup>449</sup> The only responsibilities of the Trustee are those placed on the Trustee as required by the Trust and the applicable terms of the Consent Decree.<sup>450</sup>

The second provision concerning liability of the Interim Custodial Trustee is Limitation on Financial Liability.<sup>451</sup> The Trustee is not required to expend his or her own funds or incur financial liability in the performance of duties.<sup>452</sup> Furthermore, the Trustee may choose not to exercise powers if repayment is not expected or the risk of loss is too great.<sup>453</sup> Finally, no action should be taken pursuant to the Trust which may conflict with any rule of law or terms of the Trust.<sup>454</sup>

## F. Long-Term Custodial Trust

### 1. Overview

The purpose of the Long-Term Custodial Trust is to receive, hold and manage property transferred to it pursuant to the

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<sup>449</sup>*Id.*

<sup>450</sup>*Id.*

<sup>451</sup>*Id.* at § 8.04.

<sup>452</sup>*Id.*

<sup>453</sup>*Id.*

<sup>454</sup>*Id.*



Consent Decree.<sup>455</sup> Its purposes include operating exclusively for charitable, religious, scientific, literary, or educational purposes.<sup>456</sup> Specific prohibitions include carrying on propaganda, attempting to influence legislation, or involvement in political campaigns.<sup>457</sup> In addition, the Trust may not conduct any activities not permitted by a tax exempt organization.<sup>458</sup>

Primary focus of the Duties of the Trustee is on the Custodial Trust Property.<sup>459</sup> The Trustee shall: (a) receive and hold title to the real property; (b) inaugurate and comply with Institutional Controls; (c) provide access to property; (e) insure the Custodial Trust Property against loss due to casualty or third party liability; and (f) comply with all relevant provisions of the Consent Decree.<sup>460</sup>

Also specified are the duties of the Trustee concerning Distribution of Trust Property and Termination of the Trust.<sup>461</sup>

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<sup>455</sup>*Id.* at app. IV, ex. I to the Interim Custodial Trust, art. II, § 2.02.

<sup>456</sup>*Id.*

<sup>457</sup>*Id.* .

<sup>458</sup>*Id.*

<sup>459</sup>*Id.* at art. III.

<sup>460</sup>*Id.* at § 3.01.

<sup>461</sup>*Id.* at art. IV.

Distribution by the Trustee is discretionary.<sup>462</sup>

The trust terminates after distribution of the trust property.<sup>463</sup>

The balance of the Custodial Trust Fund must be distributed to tax exempt charitable, religious, scientific, literary, or educational organizations.<sup>464</sup> Furthermore, the provision urges the Trustee to exercise the discretionary power to distribute the balance to organizations concerned with the preservation and/or cleanup of the environment.<sup>465</sup>

The Long-Term Custodial Trust also sets forth the Powers of the Trustee.<sup>466</sup> Those provisions are the same as the Interim Custodial Trust<sup>467</sup> concerning general fiduciary powers,<sup>468</sup> Retention of Property,<sup>469</sup> Preservation of Principal,<sup>470</sup> Investment of the Trust Fund,<sup>471</sup> Management of the Trust Estate,<sup>472</sup> and

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<sup>462</sup>*Id.* at § 4.01. Distribution is to the City of Woburn, the United States, or Commonwealth, or any other appropriate governmental unit, if the transferee agrees to accept it. *Id.*

<sup>463</sup>*Id.* at § 4.02.

<sup>464</sup>*Id.*

<sup>465</sup>*Id.*

<sup>466</sup>*Id.* at art. VI.

<sup>467</sup>See *infra* VII.E.1.

<sup>468</sup>*Stauffer, supra* note 6, at app. IV, ex. I to the Interim Custodial Trust, art. VI.

<sup>469</sup>*Id.* at § 6.02.

<sup>470</sup>*Id.* at § 6.03.

<sup>471</sup>*Id.* at § 6.04.

<sup>472</sup>*Id.* at § 6.05.

Powers Regarding Real Estate.<sup>473</sup>

## 2. Trustee Liability

The only difference between the Trustee Liability in the Interim Custodial Trust<sup>474</sup> and the Long-Term Custodial Trust<sup>475</sup> is in the Limitation of Liability. The Long-Term Custodial Trustee is liable only for negligence, gross negligence, or willful acts or omissions in relation to its duties.<sup>476</sup> The Interim Custodial Trustee, in contrast, is also liable for bad faith.<sup>477</sup> In addition, the provisions concerning Limitation of Financial Liability are also similar.<sup>478</sup>

## VIII. DISCUSSION

This discussion will first synthesize the problems of trustee liability, beginning with the innocent landowner.

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<sup>473</sup>*Id.* at § 6.09.

<sup>474</sup>*Id.* at app. IV, art. VIII, § 8.01.

<sup>475</sup>*Id.* at app. IV, ex. 1 to the Interim Custodial Trust, art. VIII, § 8.01.

<sup>476</sup>*Id.*

<sup>477</sup>*Id.* at app. IV, art. VIII, § 8.01. Negligence, gross negligence, willful acts or omissions, and bad faith are not defined or distinguished in either the Interim Custodial Trust or the Long-Term Custodial Trust.

<sup>478</sup>*Id.* at § 8.04; see app. IV, ex. 1 to the Interim Custodial Trust, art. VIII, § 8.05.

Second, it will review the status of trustee as an "owner" or "operator," and review the legal solutions to the problems. Third, it will review the status of the trustee, highlighting the particular problems of liability for each type of trust, and how legal solutions affect different types of trusts. Fourth, it will review the various legal tests for liability, and discuss how the legal solutions affect the issues of liability. Fifth, the discussion will summarize the law of trustee liability. Sixth, it will address the particular problem of pre-acquisition handling of the property by the trustee. The solution discussed will focus on how a trustee can attempt to avoid or minimize liability by the proposed legal solutions and taking appropriate action to determine the status of the particular parcel of land. Seventh, the discussion will turn to how the Industri-Plex model goes beyond the specific legal solutions proposed to give further protection to the trustee to reduce liability under CERCLA. Finally, the summary will discuss whether it is safe to be a trustee. It concludes that it is, if there is a combination of pre-acquisition investigation, appropriate legal protection in the trust instrument, and prudent fiduciary management.

#### A. Innocent Landowner

The problem which faces the trustee is whether it may be entitled to the defense of an "innocent landowner" under Section 107(b)(3) of CERCLA. "Due care" and "precautions against

foreseeable acts or omissions of a third party" are not defined to determine whether the "innocent landowner" defense applies in a specific case. *Pacific Hide & Fur* held there is not an absolute duty to inquire about the existence of hazardous waste when obtaining an interest in property. There is no "bright line" test in the case, however, to guide the trustee in exercising "due care" and taking "precautions against foreseeable acts of omissions of a third party." As a practical matter, the trustee still needs to determine precisely what must be done to take advantage of the statutory defense.

The Weldon proposal<sup>479</sup> would solve this problem by providing the needed specificity to outline the requirements for the trustee and other entities to follow who acquire contaminated property. Most importantly, it would provide a line of demarcation between successive owners. If an owner complies with and documents the inquiries and searches required by the statute, then the task of determining liability becomes simplified. Thus, the "innocence" may be adjudicated on the basis of records kept by the owner.

#### B. "Owner" or "Operator"

Whether a trustee is an "owner" or "operator" needs to be determined. The solution to this problem is more difficult than that of the "innocent landowner." A distinction must be drawn

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<sup>479</sup>Supra note 226.

between the state of the voluntary ownership of an acquiring party and an involuntary acquisition which may be required of a secured lender. Voluntarily, one always has more flexibility and opportunity to protect an interest. In an involuntary acquisition the opposite is true.

The Weldon proposal<sup>480</sup> would provide a clear line of demarcation among owners through specific checks on the background and use of the property. But it would not provide a solution to the situation when between lending and foreclosure an environmental hazard occurred. In that situation, the Garn proposal<sup>481</sup> would have addressed the specific problem raised in *Bergsoe Metal* by exempting the depository institution, and the mortgage lender, from an unexercised capacity to influence operations at or on property in which it has a security interest. Yet not every situation permits a "hands off" approach. The new EPA Lender Liability Rule attempts to bridge this gap. It penalizes control of environmental compliance decisionmaking, and overall management of all environmental compliance or substantively all aspects of the borrower. Left intact is the permissible management of internal financial and administrative affairs of the property by the lender. This is a direct response to the problems noted in *MB&T*, *Mirabile*, *Guidice*, and *Fleet Factors*. The Rule does not, however, address the similar problems faced by trustees.

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<sup>480</sup>*Id.*

<sup>481</sup>*Supra* note 257.

### C. Different Types of Trusts

One approach to the problem of trustee liability is to look at the type of trust involved. In particular, most problems have arisen with the statutory trust, realty trust, closely held corporation, liquidating trust, and trustee as titleholder. The role of statutory trustee in *Bliss* was sufficient to incur liability as the statutory legal representative, also influenced by facts of the trustee assisting in loading of drums of hazardous waste, and living on the property. In *Burns* liability for the realty trust arose irrespective of personal participation. *Quadion* found that a closely held corporation was liable without piercing the corporate veil because it was wholly owned by the trust. In *Rollins and Waste Management*, the corporate liquidating trust was found to have stepped into the shoes of the predecessor to be liable. Finally, in *Phoenix I* and *Phoenix II*, the bank trustee was not liable merely as executor, or for receiving the warranty deed as executor. It arose from the doctrines of *res judicata* and collateral estoppel from having argued it was an owner in an earlier proceeding.

In contrast, the use of the land trust and contingent remainder family trusts fared better by not holding the trustee liable. In the case of the land trust, *Premium* found there was no other significance to the duty of the trustee or the purpose of the trust other than holding title. *Nurad* determined that, as contingent remaindermen in a family trust, the sons had no

authority to influence decisions and were subordinate to the father in the corporate setting. In *Con-Tech* the court provided an instructive roadmap for what a trustee must do to avoid liability as trustee. In particular, the critical fact was that it tested the property for contamination and proceeded with the cleanup.

One solution to this problem would be addressed by the LaFalce proposal,<sup>482</sup> which would have simply exempted a fiduciary trustee, as well as a lender, as an "owner" or "operator." This would insulate that trustee from liability arising from the actions of previous owners. The effect of the Weldon proposal<sup>483</sup> would be broader, to include both trustees and non-trustees, which has the advantage of putting all entities on equal footing. The Garn proposal<sup>484</sup> dealt specifically with the unexercised capacity to control problem arising from *Bergsoe Metal*, which was not specifically addressed by the LaFalce proposal. The best solution would be a combination of the three to address issues relating to trustees under CERCLA.

#### D. Tests for Liability

The wide variety of legal tests that formed the basis for the analyses involving trustee liability demonstrates the

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<sup>482</sup>*Supra* note 241.

<sup>483</sup>*Supra* note 226.

<sup>484</sup>*Supra* note 257.



complexity of the issue and the need for a simple, uniform approach to the problem. *Bliss* focused on the four-part test of whether it was a facility, whether a release occurred or was threatened, whether there were response costs, and whether the statutory trustees were responsible persons. The analysis of *Burns* hinged on whether the realty trust was an "owner" or "operator" or personally participated in the actions. *Quadion* framed the test as the ability to control actions and avoid damage. It also addressed the issues of latent defects, negligence, strict liability, breach of warranty or contract, validity of an indemnity agreement, and equitable relief. The central issue in *Rollins* was that of *in personam* jurisdiction. Outcome of the case hinged on the analyses of Due Process under the Fourteenth Amendment, and whether the liquidating trustees voluntarily served to establish minimum contacts. In *Con-Tech* the test was consisted of several components. It initially determined which NCP applied in determining retroactivity of CERCLA was proper, went on to determine the appropriate standard, and finally addressed whether the action taken was remedial or a removal. The policy it embraced was that of encouraging a "private attorney general" type of action in cleanup efforts. From still another perspective, the *Waste Management* tests addressed two issues. The first was whether there was personal jurisdiction under Wisconsin law consistent with the Due Process requirements of the Fourteenth Amendment. The second was whether CERCLA liability survived a state corporate dissolution. The

tests of *Premium* were whether the trustee held title as "owner" or "operator," and whether the inability to shift the *pro rata* share of liability operated to mitigate against strict liability under the statute. *Nurad* focused on the authority to control and prevention tests. Finally, *Phoenix I* and *Phoenix II* determined the "owner" or "operator" test of whether there was daily control was appropriate for analyzing the case. In addition, they also looked at how the EPA treated the trustees, as well as *res judicata*, to determine if the trustee acted consistent with the duties of "owner" and "operator" in the past. They embraced the policy of a liberal construction to support the policy that responsible parties should bear the responsibility of paying for cleanup.

In addition to the three federal legislative proposals, the state solutions are also instructive to the potential trustee in finding a solution to the liability problem. The actions of inspecting property; prevention or remedy of a violation; refusal to accept contaminated property; the power to reach settlement; the right to disclaim power otherwise granted by statute, law or any other document; the power to decline to serve; and the charging of costs of cleanup against the trust instruct the fiduciary in proper responses in an environmental setting. But they do not address how to avoid problems prior to acquisition. The broadest solution which could be implemented at the state level, of course, is simply to adopt the provision that a trustee or fiduciary is not an "owner" or "operator."

### E. When a Trustee is Liable

Liability for trustees for environmental cleanup can be imposed on owners under federal and state and common law theories in their capacity as legal owners of trust property.<sup>485</sup> They may incur limited or unlimited personal liability.<sup>486</sup> The trustee can be held liable for damages for nuisance,<sup>487</sup> intentional tort, negligence, or strict liability.<sup>488</sup> Trustee liability under nuisance law is determined by duty, fault, causation, and the right to indemnity.<sup>489</sup> Liability can be imposed without fault or proof of causation under CERCLA.<sup>490</sup>

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<sup>485</sup>RESTATEMENT (SECOND) OF TRUSTS § 3. See Barnhill, *supra* note 4 at 845-49.

<sup>486</sup>*Id.*

<sup>487</sup>Barnhill, *supra* note 3, at 845-46. Property owners are liable for damages in nuisance when they use their property in such a way as to injure the person or property of another. *Booth v. Rome*, 140 N.Y. 267, 274, 35 N.E. 592, 594 (1893). A nuisance may arise due to an intentional act or negligent act. Failure to act to abate the nuisance after notice makes the conduct intentional. *Copart Indus. v. Consolidated Edison Col*, 41 N.Y.2d 564, 362 N.E. 2d 968, 394 N.Y.S.2d 169 (1977). In addition, absolute liability may be imposed on an owner for an ultrahazardous use of property. RESTATEMENT (SECOND) OF TORTS § 520 (C). All usual tort defenses are available to a trustee in a nuisance action. A trustee can avoid even strict liability if the trustee can prove that he or she was not the owner, or responsible for the contamination, at the time the nuisance arose. *Langan v. Valicopters, Inc.*, 88 Wash. 2d 885, 567 P.2d 218 (1977). Barnhill at 845-46.

<sup>488</sup>*Id.*

<sup>489</sup>RESTATEMENT (SECOND) OF TRUSTS §§ 264, 265.

<sup>490</sup>*Monsanto*, *supra* note 3. See also Barnhill, *supra* note 3, at 846-848. Environmental liability is imposed on landowners because of ownership. CERCLA § 101(32). A trustee could be

The black letter law<sup>491</sup> incorporating the basic principles of trustee liability under CERCLA may be summarized in the following manner. First, *Bliss* held statutory trustees of a defunct corporation are liable for permitting disposal of drums of hazardous waste to the extent corporate property and effects come into their hands.<sup>492</sup> Second, *Burns* held owners of a realty trust liable who are "owners" or "operators" without personal participation in management.<sup>493</sup> Third, *Quadion* held trustees that are sole owners of a closely held corporation are liable

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liable as an owner or operator of a "facility." CERCLA § 101(d). Current owners of hazardous waste sites are also jointly and severally liable with former owners of the site, even if the current owner of the site is without fault. *Monsanto*, *supra* note 3, at 167-68; *Northeastern Pharmaceutical*, *supra* note 3, at 726. All responsible parties are liable once actionable contamination has been found. *Shore Realty*, *supra* note 3, at 1042. In order to successfully defend against a claim under CERCLA, a defendant must show that the contamination was caused by an act of God, act of war, or an act or omission of an unrelated third party. CERCLA § 107(b). The third party must not be an employee or agent of the defendant, or someone whose act or omission occurred in connection with a direct or indirect contractual relationship with the defendant. CERCLA § 107(b)(3). The defendant must show that he exercised due care under the circumstances with respect to the hazardous substance and that he took precautions against foreseeable acts or omissions of their parties, as well as against their consequences. *Id.* The "innocent landowner" defense is available to those who show that the real estate was acquired after the hazardous substances were placed on the real estate, and that, at the time of transfer, the defendant did not know, or have reason to know, of the presence of the hazardous substances. CERCLA § 101(35)(A). The landowner must show that he or she had no reason to know of the hazardous substances, through appropriate inquiry into the previous ownership and uses of the property in an effort to minimize liability. CERCLA § 101(35)(B). *Barnhill* at 846-48.

<sup>491</sup>BLACK'S LAW DICTIONARY 154 (5th ed. 1979).

<sup>492</sup>See *infra* IV.B.1.

<sup>493</sup>See *infra* IV.B.2.

without facts to pierce the corporate veil merely by having the responsibility to control activities and avoid damage.<sup>494</sup>

Fourth, *Rollins* held a corporate liquidating trust is liable when it steps in the shoes of its predecessor.<sup>495</sup> Fifth, *Con-Tech* held that a trustee is not liable when it acts as to notify the regulators of preexisting contamination and proceeds with a private cleanup.<sup>496</sup> Sixth, *Waste Management* held that a liquidating trustee is liable for surviving claims under CERCLA, even though a state dissolution proceeding was initiated against its predecessor.<sup>497</sup> Seventh, *Premium Plastics* held a land trustee was not liable as an owner or operator by only holding title to property.<sup>498</sup> Eighth, *Nurad* held contingent remaindermen of a family trust are not liable when they lack the authority to control decisions concerning the property.<sup>499</sup> Finally, *Phoenix I* and *Phoenix II* held a bank trustee of an estate with title to a landfill is liable as an "owner" or "operator" under the doctrine of *res judicata* when previously determined to be an "owner"; in addition, liability does not automatically attach as executor, or by receiving a warranty deed.<sup>500</sup>

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<sup>494</sup>See *infra* IV.B.3.

<sup>495</sup>See *infra* IV.B.4.a.

<sup>496</sup>See *infra* IV.C.3.

<sup>497</sup>See *infra* IV.B.4.b.

<sup>498</sup>See *infra* IV.C.1.

<sup>499</sup>See *infra* IV.C.2.a, b.

<sup>500</sup>See *infra* IV.B.5.a, b.

## F. Pre-acquisition: Avoiding Problems

Perhaps the most critical juncture for the trustee, as well as any other potential owner of property with respect to CERCLA, is prior to acquisition. What should one do?

The Weldon proposal would set the standard for appropriate action by the trustee and provide uniformity. The list of specific duties required in the Phase I Environmental Audit provides an extremely useful checklist which can easily be followed by the practitioner.

Absent such a statutory enactment, the best pre-acquisition advice which a prospective trustee can receive from an attorney is to identify and evaluate hazardous waste problems. This satisfies the standard of inquiry necessary to preserve the "innocent landowner" defense if hazardous substances are discovered on the land. The sources of information which may be used in an environmental pre-acquisition investigation include: hazardous waste site lists; federal government agencies; state environmental agencies; past permits, environmental reports, and compliance records; Security and Exchange Commission (SEC) records; county records; conversations with the seller, employees and neighbors; law firms with a significant environmental practice; and a physical inspection of the property.<sup>501</sup> Soil and water samples could also be obtained from the prior owner to

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<sup>501</sup>Kathryn E.B. Robb, *Environmental Considerations in Project Financing*, 605 P.L.I. COMM. 543 (1992).

establish whether the site was free from contamination prior to ownership. Finally, the trustee could demand that any contamination present be cleaned up prior to acquisition of the land.

The trustee can take several other measures to avoid liability prior to acquisition of the property. Insurance against liability for cleanup can be purchased.<sup>502</sup> In addition, indemnities, warranties, and covenants can also be obtained from the previous owner to protect the trustee.

#### G. Post-Acquisition: Solving Problems--

##### The Industri-Plex Solution

There are four critical parts of the Industri-Plex solution which are worthy of a closer analysis. Specifically, they involve how it addresses the problems of "innocent landowner," "owner" or "operator," trustee liability, and the relationship of the parties which may commonly be key players in a Superfund cleanup.

First, the problem of the innocent landowner is dealt with primarily by the Remedial Trust and the Interim Custodial Trust. The Remedial Trust's purpose is the environmental cleanup. Once this is completed, the Interim Custodial Trust must determine that the land is clean prior to sale. At least to subsequent purchasers, the problem of being an innocent landowner is

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<sup>502</sup>Barnhill, *supra* note 3, at 850.

avoided, because such a cleanup is a prerequisite to sale.

Second, the problem of whether the trustee is an "owner" or "operator" is addressed in the Consent Decree. One mechanism is the imputed liability to the Settlers for the joint and several liability incurred by the trustees. The second, and perhaps most important mechanism, is that the EPA and Commonwealth agree that the trustees are not "owners" or "operators." Thus, the trustees are shielded from liability for past actions of PRPs, and avoid the tangled analyses of the federal cases.

Third, the specific issue of trustee liability is addressed by the Remedial Trust, Interim Custodial Trust, and the Long-Term Custodial Trust. The Remedial Trust, in charge of the cleanup, is liable for negligence, gross negligence, and willful misconduct. Liability of the Interim Custodial Trust includes bad faith. The Long-Term Custodial Trust is similar the Remedial Trust. It is perhaps more important that the duties of cleanup are separated from that of responsibility for sale and long-term holding of the property. This avoids any judicial inference that the Interim and Long-Term Custodial Trusts are actively involved in the management of the property. Their positions are more analogous to the land trust, which has met with some measure of success in the judicial determinations analyzed in this discussion.

Most importantly, the relationship of the parties is essential to the success of Industri-Plex. The Interim Custodial Trust cleverly makes the EPA, Commonwealth, City of Woburn, and



Remedial Trust beneficiaries. There are two consequences which result from this alliance. First, it puts the parties which normally are at odds on one side. Thus, for purposes of sale, all parties must be consulted to proceed. Furthermore, if there is not to be a sale of the property, that decision is also made in consultation with the regulators. This unique blending of the role of regulator with that of beneficiary ultimately fosters cooperation and financial gain. The incentive for reuse is a strong one for all parties because they have a contingent interest in such sale, with the sole exception of the trustee. Second, the Long-Term Custodial Trust resolves an important problem of how to deal with the property which cannot be resold. It manages the property by addressing the contingency in tandem with the prospect of eventual sale. Assuming sale is not possible, it essentially resolves the issue of retroactive liability, since that previously was addressed in the Consent Decree as residing in the original Settlers. Thus, the trustee is removed from latent liability.

#### H. Is it Safe to be a Trustee?

The answer to this question is that it is safe to be a diligent trustee under CERCLA. There are three keys to ensuring this safety. The first key is the pre-acquisition investigation. Regardless of the type of trust involved, the trustee can take necessary measures to discover the status of the property.

Another key is to use due care in the management of the site in carrying out the fiduciary duties to ensure preservation of the property for the beneficiary. Finally, the appropriate legal mechanisms must be in place to protect the trustee. As demonstrated in the Industri-Plex model, the use of the Consent Decree proved instrumental in serving to protect the trustees of the Interim and Long-Term Custodial Trusts. In particular, the agreement with the EPA that the trustee was not an "owner" or "operator," combined with the imputed liability to the original Settlers, provides a great deal of safety to the prudent trustee.

When the trustee does not make the appropriate pre-acquisition inquiries or carry out his or her fiduciary duties with diligence, the risk of liability increases. Even the most sophisticated legal drafting cannot rescue inattentive behavior from liability under CERCLA.

## CONCLUSION

The law through the centuries adapts to the changing needs of society. History has shown the trust has been particularly adept at solving problems that could not be resolved by legal remedies. Development of the trust from English common law came from this adaptation to change. In the modern context of environmental law, the trust can help deal with pollution and hazardous waste. The time has come to seek solutions to environmental problems. It is clear that the trust can meet that challenge, as it has in the past, and enable responsible parties to return damaged land to a useful and productive state.